Wrongful Discharge Actions After *Lueck* and *Metropolitan Life Insurance*: The Erosion of Individual Rights and Collective Strength?

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With the erosion of the doctrine of at-will employment in most jurisdictions, workers are filing increasing numbers of wrongful discharge actions. The author discusses how employees who are covered by collective bargaining agreements may be prevented from pursuing state-created rights in some instances by the Labor Management Relations Act. The author outlines the development of Section 301 doctrine, focusing particularly on recent Supreme Court decisions, Allis-Chalmers v. Lueck *and* Metropolitan Life Insurance v. Massachusetts. *The author proposes that while Section 301 preemption properly limits wrongfully discharged employees from pursuing contract claims under state law, such employees should be able to assert tort and statutory claims which are based on nonwaivable rights created by state law independent of contract.*

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INTRODUCTION

During the last decade, there has been a revolution in labor-management relations. The percentage of workers who belong to unions has declined to its lowest point since before 1920.[1] As union membership has ebbed, courts have become willing to carve out exceptions to the employment-at-will rule, which provides that employees hired for an indefinite term may be terminated by their employers for any reason.[2] Courts and commentators have recognized the heightened import that individuals and society attach to job status and job security.[3] Thus, state courts and

1. In 1920, the percentage of non-agricultural workers who were members of labor organizations was approximately 19.4%. H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 17 (1950). According to the most current figures published by the Bureau of Labor Statistics, 17.5% of the eligible workforce belongs to labor organizations. *Ease in Union Membership Decline*, 124 Lab. Rel. Rep. (BNA) 140, 140 (March 2, 1987); *see also* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 & n.3 (1983) (1980 percentage of union density at lowest level since 1935). In 1946, the percentage of union members reached its zenith, when about 35% of the non-agricultural workforce were union members. N. CHAMBERLAIN, D. CULLEN & D. LEWIN, THE LABOR SECTOR 124 (1980).

2. *See, e.g.*, Fenton v. Federal St. Bldg. Trust, 310 Mass. 609, 612, 39 N.E.2d 414, 415 (1942); Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884). The essence of at-will employment is that employers are free to terminate employees hired for an indefinite term for good reason or bad reason or without offering any reason at all. For an overview of the development, justification, flaws and decline of the at-will doctrine, see generally M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 143-70 (1981); Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1082-86, 1097-1109 (1984) [hereinafter Summers, *The Contract of Employment*]; Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481, 484-519 (1976) [hereinafter Summers, *Time for a Statute*]; Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1405 (1967); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

3. *See, e.g.*, Geary v. U.S. Steel Corp., 456 Pa. 171, 173, 319 A.2d 174, 176 (1974); M. GLENDON, *supra* note 2, at 143, 169-76, 185-92, 202; Blades, *supra* note 2, at 1405-06; Reich, *The New*

legislatures have steadily chipped away at the antiquated at-will doctrine.[4] Courts have recognized three somewhat distinct causes of action for wrongfully discharged "at-will" employees:[5] 1) rights of action for bad faith terminations that violate an implied-in-law covenant of good faith and fair dealing;[6] 2) rights of action inferred from implied-in-fact contract terms;[7] and 3) rights of action against abusive or retaliatory discharge found to violate a state's public policy.[8]

As state courts have recognized with increasing frequency that at-will employees have causes of action for wrongful terminations, unionized employees[9] have attempted to avail themselves of a forum in state courts, either in lieu of or in addition to utilizing the grievance and arbitration machinery contained in their collective bargaining agreements. But the Supreme Court, with a few notable exceptions, has long interpreted section 301 of the Labor Management Relations Act (LMRA)[10] to require that the grievance and arbitration procedure be the exclusive means of resolving employment disputes during the term of the collec-

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Property, 73 YALE L.J. 733, 738-39, 785 (1964); Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 742, 752-53 & n.85.

4. At last count, forty states have carved out exceptions to the at-will doctrine. Strasser, *Employment-at-Will: The Death of a Doctrine*, Nat'l L.J., January 20, 1986, at 1, col. 2. *See* Lopathka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 BUS. LAW. 1 (1984). *See generally* sources cited *supra* at note 2.

5. From an employee's perspective, the essence of at-will employment is the complete absence of job security. Where state courts and legislatures have recognized or provided causes of action to protect the job status of "at-will" employees, it seems somewhat of a muddle to continue to denominate these employees as "at-will." Nevertheless, to avoid confusion, I shall adopt the conventional at-will label to refer to private sector employees not covered by a collective bargaining agreement containing a just cause provision enforceable by final and binding arbitration.

6. *See, e.g.*, Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (1984); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

7. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981) (implied contract may arise from "the duration of . . . employment, the commendations and promotions . . . received, the apparent lack of any direct criticism of . . . work, the assurances . . . given, and the employer's acknowledged policies"); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (just cause provision in employee handbook supplies enforceable contract term); Wooley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985) (absent express disclaimer, employer obligated to follow procedures in company employment manual).

8. *See, e.g.*, McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980) (construing Massachusetts law); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976); Sabine Pilots Serv. v. Hauck, 687 S.W.2d 733 (Tex. 1985); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978); Brockmeyer v. Dun & Bradstreet, 133 Wis. 2d 561, 335 N.W.2d 834 (1983).

9. Approximately 86% of all labor contracts contain some sort of just-cause provision requiring that employers have grounds for firing employees. 2 Collective Bargaining Negot. & Cont. (BNA) 40:1 (1986). Arbitration clauses are contained in 97% of the agreements that were sampled in the most recent survey; 99% in the manufacturing sector, 97% in nonmanufacturing. *Id.* at 51:5.

10. 29 U.S.C. § 185 (1982); *see infra* note 27.

tive bargaining agreement. The efforts of unionized workers to bring state wrongful discharge actions are thus seemingly at odds with congressionally mandated federal labor law policy favoring arbitration as a means of promoting industrial peace.

Arguably, where state law provides a remedy that allows an aggrieved employee to bypass the arbitral machinery contained in the labor agreement, or where state law confers a substantive right on individual employees that establishes a minimum benefit regardless of the provisions of the labor contract, there is a resulting "conflict" with the collective agreement. Where such a putative conflict occurs, some commentators have asserted, the state right of action must yield to the substantive terms of the collective agreement, which is stamped with the imprimatur of federal law. In order to resolve the perceived conflict, the policies and purposes of Congress when it enacted the National Labor Relations Act (NLRA or Act) must be ascertained.[11] There also must be an inquiry into the text of the Act. The question to be answered is whether the architects of federal labor law would have approved of the preemption of all state rights of action for wrongful termination.

There are many instances in which unionized workers should be permitted to proceed in state court to assert state-created wrongful discharge actions, notwithstanding the existence of grievance and arbitration machinery in the collective agreement. Where the state right of action has a basis or genesis independent of the labor agreement, and where state law confers nonwaivable rights on individual workers, unionized employees should be permitted to proceed in state court. That is, there should be no preemption in those instances in which rights against wrongful discharge are accorded as a matter of state law and may not be negotiated or traded away for other benefits, in those instances in which rights are not contingent on individual negotiation or collective bargaining, and in those instances in which state rights against wrongful discharge automatically attach to all individual employees simply as a result of the employment relationship itself.

This view is strongly suggested by two recent Supreme Court opinions: *Allis-Chalmers Corp. v. Lueck*[12] and *Metropolitan Life Insurance v. Massachusetts*.[13] However, this interpretation of these cases has not been adopted by the vast majority of lower courts. The gloss that many lower courts have put on *Lueck* reflects a mistaken view of the Supreme Court's analysis. This misinterpretation, were it to prevail, would have the effect of creating a new regime in labor relations, with unionized workers seriously disadvantaged in relation to their nonunion counter-

11. 29 U.S.C. §§ 151-169 (1982).

12. 471 U.S. 202 (1985).

13. 471 U.S. 724 (1985).

parts and their employers. Such a regime would undermine both the individual rights of employees and the collective strength of unions in a way not envisioned by the 74th Congress when it passed the Wagner Act in 1935 or the 80th Congress when it enacted the LMRA in 1947.

Part I develops a hypothetical case that frames these issues. Part II, traces the history of section 301 and labor preemption doctrine, and the application by the courts of section 301 and preemption principles to wrongful discharge actions decided prior to *Lueck* and *Metropolitan Life*. Part III analyzes these two seminal cases and derives and applies several general principles from the Court's opinions to aid in determining whether state wrongful discharge actions should be preempted or treated as section 301 claims. Part IV canvasses a representative sample of the wrongful discharge opinions of the lower courts that followed in the wake of *Lueck*, and explains why the reasoning of the lower courts is incompatible with congressional intent and the purposes of the Act. Finally, the Conclusion argues that permitting unionized workers to bring state wrongful discharge actions is consistent with the federal labor scheme.

I
AN INTRODUCTORY HYPOTHETICAL: THE CASE OF SALLY, HARRY, GIANT COMPUTER AND THE UNITED HIGH TECH WORKERS

The abstract doctrinal questions that arise when unionized employees attempt to bring state wrongful discharge claims are very complex. The following hypothetical case follows as an analytical tool to frame the issues in concrete terms.

Harry and Sally both work for Giant Computer Company, Inc. Two of Giant's facilities are organized: Giant-Boston and Giant-Providence. A majority of the workers in the bargaining units at Giant-Boston and Giant-Providence have designated the United Hi-Tech Workers (UHW) as their exclusive representative for the purposes of collective bargaining.[14] The two plants are covered by the same master collective bargaining agreement,[15] which provides that workers may be discharged

14. The Supreme Court has long recognized that one of the essential premises of the NLRA is exclusive representation based on majority rule. Emporium Capwell v. Western Addition Community Org., 420 U.S. 50, 62 (1975); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); *see* Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945); *see also infra* notes 55-56 and accompanying text.

15. The extent to which multiplant and multiemployer agreements represent the norm in American industrial relations is not entirely clear. *See* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 38-39 (1984); *cf.* N. CHAMBERLAIN, D. CULLEN & D. LEWIN, *supra* note 1, at 222. Where there are multiplant agreements, however, it is plain that a provision allowing for local bargaining to accommodate atypical local conditions is the norm. T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 95 (1983).

only for "just cause."[16] The agreement further contains a grievance procedure that culminates in "final and binding," ad hoc arbitration by a neutral arbitrator.[17]

Harry and Sally have been employed by Giant for nearly ten years, and their work records are flawless. Harry, however, works at the unionized Giant-Boston, while Sally works at one of Giant's non-union plants—Giant-Suburban, Massachusetts. Despite many efforts by the UHW to organize Giant-Suburban, the union has never been able to arouse sufficient interest to mount a full-fledged organizing campaign. Giant-Suburban has informed its workers (accurately) that they earn the same wages and receive the same fringe benefits as the unionized workers at Giant-Boston.[18] Thus far, union promises of job security and an end

16. *See supra* note 9.

17. There are three types of procedural devices for arbitral decisionmaking provided in agreements. Permanent umpires are on retainer by the parties, usually for the term of the agreement; the umpires hear all the disputes that the parties submit to arbitration. Some agreements provide for a panel of arbiters, usually one supplied by the union, one by the employer, and a third selected jointly. By far the most common method of arbitral dispute resolution is "ad hoc" arbitration, in which the parties retain the arbitrator for only one hearing at a time, thus limiting the role of stare decisis in arbitration proceedings.

The most recent sample survey of collective bargaining agreements shows that 96% of the agreements specify the means for designating an arbitrator, of which 74% employ ad hoc arbitration, 6% use a permanent umpire, 2% a permanent arbitration board, and 6% select arbiters from among a permanent list of individuals who serve on a rotating basis. 2 Collective Bargaining Negot. & Cont. (BNA) 51:5-6 (1986). For an overview of the methods of arbitral selection, see generally F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 135-37 (4th ed. 1985).

18. Unionized workers generally earn more and have higher benefit levels than nonunion employees. On an intrafirm basis and within industry segments, however, unionized and nonunionized workers tend to obtain equivalent wages and fringe benefits. R. FREEMAN & J. MEDOFF, *supra* note 15, at 46-48, 50-51, 62-68, 70, 151-52. Consequently, the only *immediate* benefit that unions legitimately can offer in organizing campaigns is the end to discriminatory and arbitrary treatment, generally improved working conditions, protection against unjust termination, and a measure of participation in workplace decisionmaking, *viz.*, industrial democracy. In the long term, unions legitimately can promise improved wage and benefit levels, provided that a greater percentage of workers opt for unionization. The irrelevancy of the labor movement has been unflinchingly argued by conservatives; *see, e.g.*, Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U. CHI. L. REV. 1012, 1019-20, 1023, 1028, 1030-38 (1984); Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); and suggested with timidity by some liberals. *See, e.g.*, Mikva, *Hard Times for Labor*, 7 INDUS. REL. L.J. 345, 351-53 (1985).

Despite these arguments, I continue to believe that unions are capable of making a vital contribution to the lives of working Americans. Unions remain the only viable mechanism for giving individual workers a genuine means of participation on a more or less equal and democratic level with employers. *See* L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 394 (1978); *see also* R. FREEMAN & J. MEDOFF, *supra* note 15, at 8-11; Block, *Labor Law and Fundamental Issues in Unions: A Research Agenda*, 7 INDUS. REL. L.J. 356, 361 (1985); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 724 (1973).

Employer-initiated and controlled grievance procedures, work quality circles, and the like, cannot substitute for genuine employee participation and workplace democracy. These plans are employer-created, and are subject to employer manipulation, and, ultimately, unilateral dissolution. *See* R. FREEMAN AND J. MEDOFF, *supra* note 15, at 108-09; *cf.* Catler, *The Case Against Proposals to Eliminate the Employer At Will Rule*, 5 INDUS. REL. L.J. 471, 494-508 (1983); Note, *Collective*

to arbitrary action by Giant supervisors have not had sufficient force to convince the Suburban workers to enlist in the UHW organizing effort.

But as a result of recent layoffs in the infant industry and an incident involving Sally, the union's organizing drive gains new energy; the UHW is preparing to petition the National Labor Relations Board (NLRB or Board) for a representation election. Giant asks Sally to take a lie detector test. She refuses, and Sally is summarily fired.

Sally attempts to avail herself of the company grievance procedure set forth in Giant's Employee Handbook, but Giant refuses to talk with her further. Sally then retains a lawyer on a contingency fee basis and files suit in state superior court alleging wrongful termination in violation of public policy, breach of an implied-in-fact contract, and breach of the implied covenant of good faith and fair dealing. The court grants Sally's summary judgment motion on the liability issues,[19] and the judge has set a trial date solely for the purpose of ascertaining Sally's damages. Both Sally and her lawyer are confident of winning a sizeable jury award for damages.

Simultaneously, Harry is also fired for refusing to submit to a lie detector test. Harry, who has paid union dues as a condition of employment for many years,[20] has never really thought much about the union. He rarely attends union meetings, and is not even sure what the name of his union is. He does know that the union is around to help workers in these kinds of situations. Thus, Harry immediately seeks out his shop

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Bargaining As An Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act, 96 HARV. L. REV. 1662, 1663 (1983).

19: MASS. GEN. LAWS ANN. ch. 149, § 19B (West 1982) provides in pertinent part that "[a]ny employer who subjects any person employed by him . . . to take a lie detector test, shall be punished by a fine . . . ." The Massachusetts courts have recognized that a cause of action exists for a discharge contrary to public policy. Siles v. Travenol Laboratories, Inc., 13 Mass. App. Ct. 354, 358, 433 N.E.2d 103, 106, *appeal denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982); *see* McKinney v. National Dairy Council, 491 F. Supp. 1108, 1120-22 (D. Mass. 1980); Cort v. Bristol-Meyers Co., 385 Mass. 300, 306 n.6, 308, 310, 431 N.E.2d 908, 911 n.6, 912 (1982); Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 668-69 n.6, 671-72, 429 N.E.2d 21, 27 & n.6 (1981); *see also* Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985) (based on Maryland statute banning use of polygraph tests in employment context, affirming jury award of five million dollars in compensatory and punitive damages to four employees fired or constructively discharged after refusing to submit to a polygraph test). The Massachusetts courts also have recognized a cause of action sounding in contract for a breach of the implied covenant of good faith and fair dealing. *See, e.g.*, Maddaloni v. Western Bus Lines, 386 Mass. 877, 884, 438 N.E.2d 351, 356 (1982); *see also* cases cited *supra* at note 6. The Massachusetts court of appeals has indicated that an employer's failure to follow the procedures prescribed in an employee handbook may give rise to a cause of action for unjust termination. Garrity v. Valley View Nursing Home, Inc., 10 Mass. App. Ct. 822, 406 N.E.2d 423, 424 (1980); *see* cases cited *supra* at note 7.

20. According to the NLRA, a union may negotiate a union shop unless prohibited by a state "right to work" law. § 14(b), 29 U.S.C. § 164(b) (1982). For cases limiting union shop provisions under the Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1982), and in the public sector, see Chicago Teachers Union v. Hudson, 106 S. Ct. 1066, 1073 & n.8 (1986); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-26 (1977); and Railway Employees Dep't v. Hanson, 351 U.S. 225, 233-38 (1956).

steward, who files a grievance alleging that Harry was discharged without "just cause" in violation of the agreement.

After Giant-Boston refuses to reinstate Harry at the lower steps of the grievance procedure, the UHW international representative, who regularly services the plant, flies into town to determine whether the grievance merits taking to arbitration. She makes a thorough investigation, but determines that, although it is possible to win the grievance, it is not likely because of the "obey first, then grieve" rule.[21] Moreover, the local union's resources have been dwindling as a result of an unusual number of recent arbitrations resulting from Giant-Boston layoffs, and the international union has been expending a great deal of dues money in its effort to organize Giant's nonunion plants. In short, the paid UHW official makes an honest, good-faith, although I believe mistaken, determination that the grievance does not warrant taking to arbitration. The UHW representative views her first loyalty to the group as a whole.[22]

Dismayed but undaunted, Harry retains a lawyer and files suit in state superior court for wrongful discharge in violation of public policy, and for violation of the implied covenant of good faith and fair dealing, as did Sally. Harry does not, however, allege a breach of the collective agreement's "just cause" provision. Giant nevertheless removes the suit to federal district court, arguing that, although Harry's complaint does not allege a breach of the collective agreement, the cause of action is cognizable under the collective bargaining agreement; thus, it is an "artfully pled" section 301 claim and federal jurisdiction lies.[23]

Giant simultaneously moves for summary judgment because Harry failed to exhaust the grievance and arbitration procedure.[24] Alternatively, Giant argues that summary judgment lies because the state causes of action are preempted. If the claim is not cognizable under the contract and hence is not a section 301 claim, Giant posits, the state has

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21. The "obey first, then grieve" rule is thought to be essential to industrial discipline. *See, e.g.*, Feller, *supra* note 18, at 738; F. ELKOURI & E. ELKOURI, *supra* note 17, at 199-203; Ford Motor Co., 3 Lab. Arb. (BNA) 779, 780-81 (1944) (Shulman, Arb.).

The only traditional exception to the "obey, then grieve" rule is where the employee faces an imminent health or safety hazard. Feller, *supra* note 18, at 738, n.344. But on the facts of Harry's case most, if not all, arbitrators would order reinstatement. Harry's length of service to the employer and otherwise perfect work record would outweigh his refusal to take the test. *See id.* at 780; F. ELKOURI & E. ELKOURI, *supra* note 17, at 679, 682; *cf.* M. GLENDON, *supra* note 2, at 154-56 (recognizing the increasing propensity of labor arbitrators to reinstate discharged workers over the last decade).

22. *See infra* pp. 656-58. I believe that the judgment made by the union representative, while probably not the norm, is not pathological. Union officials are often far too busy and harried to perform their tasks with optimal zeal and efficiency. Moreover, there is tremendous pressure to develop an amiable relationship with employers, which often influences the decisions that union leaders make as to whether or not to submit a grievance to arbitration.

23. *See infra* note 104.

24. *See infra* text at notes 43-56.

imposed a term on the parties for which they did not bargain. Thus, Giant asserts, the state law right of action interferes with the federal labor law policy ensuring noninterference with the collective solution privately worked out by the union and the employer.[25] Harry, of course, will petition to remand his action back to state court. Because the jurisdictional and substantive issues tend to merge, the district court, with one inquiry, will render a decision regarding both issues.[26] Both court actions—Harry's unresolved suit and Sally's litigation victory—provide a backdrop for the legal analysis that follows.

II
JUDICIAL INTERPRETATION OF SECTION 301 AND PREEMPTION DOCTRINE

A. The Meaning and Purpose of Section 301: Federal Law, the Requirement of Exhaustion, and Labor Peace

Congress enacted section 301 of the LMRA when it passed the Taft-Hartley Act in 1947.[27] In section 301 litigation, the Supreme Court has repeatedly stressed two related congressional goals: the central role of private arbitration as a mechanism for achieving industrial peace and stability and the importance of developing a uniform body of law relating to labor contract interpretation.

The meaning and purpose of section 301 have generated great debate among courts and commentators since its passage.[28] In 1957, a divided Court began to pour meaning into section 301 when it held in *Textile Workers v. Lincoln Mills*[29] that "[section] 301(a) is more than

25. *See infra* text at notes 127-37 and note 152.

26. If Harry's complaint is within § 301, federal jurisdiction will lie and his claim concurrently will be dismissed, because of his failure to exhaust the grievance and arbitration procedure. *See infra* notes 42-61 and accompanying text; *see also infra* notes 104, 171. *But cf. infra* note 206.

27. Section 301(a) provides in pertinent part that

> [s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . . without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1982).

28. There is a paucity of legislative history regarding the intended meaning of § 301. It appears that Congress was troubled because it believed that it was difficult for employers to sue unions as entities in state courts to enforce contracts. Thus, the purpose of § 301 seemed to be to provide recourse to the federal courts to enforce contracts as a vehicle for achieving labor peace. *See, e.g.*, S. REP. NO. 105, 80th Cong. 1st Sess. 16 (1947), *reprinted in* NATIONAL LAB. REL. BD., 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 415 (1985) [hereinafter HISTORY OF THE LMRA]; 93 CONG. REC. 3955 (1947), *reprinted in* 2 HISTORY OF THE LMRA, *supra*, at 1014 (remarks of Senator Taft, introducing the Bill); *see also* H. MILLIS & E. BROWN, *supra* note 1, at 500-13; Atleston, *The Circle of* Boys Market*: A Comment on Judicial Inventiveness*, 7 INDUS. REL. L.J. 88 (1985); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 19-20 (1957); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1 (1947).

29. 353 U.S. 448, 455 (1957).

jurisdictional—that it authorizes federal courts to fashion a body of federal [common] law for the enforcement of . . . collective bargaining agreements and includes within that federal law specific promises to arbitrate grievances."[30] Justice Douglas, writing for the Court, reasoned that a federal common law must be developed to ensure the specific performance of arbitration clauses, because the Congress intended section 301 to be a mechanism for labor peace, and "[p]lainly, the agreement to arbitrate is the *quid pro quo* for an agreement not to strike."[31] As to the source of this new body of federal common law the Court opined that

> [t]he Labor Management Relations Act expressly furnishes some substantive law. . . . Other [solutions to] problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[32]

Five years later, in *Local 174 v. Lucas Flour*[33] the Court held that federal common law must govern in suits brought in state courts that are in effect section 301 suits to compel arbitration under a collective agreement. The Court concluded that "incompatible doctrines of local law must give way to principles of federal labor law."[34] A uniform body of federal law respecting contract interpretation was necessary to ensure or-

30. *Id.* at 450-51; *see also* S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947) ("The chief advantage that an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of an agreement, there is little reason why an employer would desire to sign such a contract."). *But cf.* Feller, *supra* note 18, at 778, 798 (asserting that an employer's incentive to agree to arbitration transcends the desire to exact a no-strike pledge; employers also use the grievance and arbitration mechanism as a way of ensuring that employees, at least in the first instance, adhere to management-promulgated work rules); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955) (same). For an interesting argument agreeing with Professor Feller's major premise, but then positing that the industrial regime created by arbitration benefits employers at the expense of unions and individual workers, see Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1565-66 (1981).

31. 353 U.S. at 455. But Professor Stone miscomprehends the problem. With rare exceptions, it is virtually impossible to mobilize workers to take collective action in response to individual grievances that are the usual stuff of arbitration. Thus, without judicial access, the only alternative to arbitration for most workers is acquiescence in the status quo and managerial autocracy. *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 118-19 (1968); *supra* note 18; *infra* note 265 and accompanying text.

32. 353 U.S. at 457 (citations omitted).

33. 369 U.S. 95, 102 (1962). Earlier that term the Court had held that the state courts are not deprived of jurisdiction in suits brought under § 301 in Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506 (1962).

34. *Lucas Flour*, 369 U.S. at 102.

derly collective bargaining, and was thus central to the maintenance of labor peace.

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.[35]

In the famous *Steelworkers' Trilogy*,[36] the Court fleshed out the role of the courts and the judicial relationship to arbitration proceedings when the courts were called on to compel arbitration and to enforce arbitration awards. Courts were to take a very deferential posture with respect to the arbitral award[37] because "the . . . part[ies] should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[38] In the *Trilogy*, the Court emphasized the lack of institutional competence of courts in contrast to that of arbiters, in adjudicating industrial disputes and in interpreting the "common law of the shop,"[39] the centrality of arbitration to the system of collective bargaining,[40] and, once again, the vital role that it saw arbi-

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35. *Id.* at 104 (citations and footnotes omitted).

36. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (emphasizing that the common law's traditional hostility toward arbitration has no place in the context of labor relations, and reiterating that, in determining whether to compel arbitration, the courts' inquiry with respect to the merits of the dispute must be very circumspect); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (arbitration awards must be enforced even if the arbitrator does not provide the reasoning for her award, provided the award is "drawn from the essence of the agreement"). The Court recently reaffirmed the principles established in the *Trilogy* in AT&T Technologies, Inc. v. Communications Workers, 106 S. Ct. 1415 (1986).

37. *See supra* note 36.

38. *American Mfg.*, 363 U.S. at 568.

39. *Warrior & Gulf*, 363 U.S. at 581-82.

40. *Id.* at 581. The Court stressed that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *Id.* The metaphor was apparently first suggested as an apt description of the collective bargaining relationship in legal commentary in Weyand, *supra* note 14, at 563-64 and in Cox, *supra* note 28; *see also* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 621-22 (1956) [hereinafter Cox, *Rights*]; Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 22-26, 30 (1958) [hereinafter Cox, *Legal Nature*]; Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1492 (1959) [hereinafter Cox, *Reflections*]. It subsequently has been adopted and endorsed by virtually all commentators. *See, e.g.*, VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67

tration playing in effecting industrial peace and stability.[41]

What does all this mean for Harry, whose union has refused to take his case to arbitration? We now know that if Harry's suit is based on or must be swept within the scope of section 301, federal law will supply the rule of decision. A federal question will therefore have been presented, and, according to traditional principles of removal, the federal district court will have jurisdiction.[42] The crucial question for Harry is thus the breadth of section 301. Harry did not plead a breach of the collective agreement, but only asserted claims arising under state law. Does his claim nevertheless come within the seemingly limitless scope of section 301? Before turning to the ultimate question of whether his claim falls within section 301, in order to appreciate what is at stake for Harry, an antecedent question must be addressed: may Harry press his state claims without first having resorted to and exhausted the grievance and arbitration procedure contained in the agreement?

In *Republic Steel Corp. v. Maddox*,[43] the Court held that "[a]s a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress."[44] At first glance, with one distinction that will not turn out to be significant, it would appear that the facts in *Maddox* and in Harry's suit are identical. And indeed Giant will argue that *Maddox* is controlling, despite Harry's unsuccessful effort to avail himself of the grievance procedure.

Charlie Maddox brought suit in Alabama state court for breach of

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MINN. L. REV. 1079, 1106 n.81 (1983); Weiler, *Striking A New Balance: Freedom of Contract and the Prospects For Union Representation*, 98 HARV. L. REV. 351, 374 (1984). This powerfully descriptive metaphor has long been invoked for a variety of purposes in labor law doctrine, principally to hold unions to a duty of fair representation and to justify particular models of fair representation. *See, e.g.*, Bowen v. United States Postal Serv., 459 U.S. 212, 224-25 (1983) (damages must be apportioned between union and employer where the union's breach of its duty of fair representation caused increased damages); Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944) (unions have a duty of fair representation toward employees in the bargaining unit, because unions are "clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates . . . ."); Harper & Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1212 (1985); Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251, 253 (1977).

41. *American Mfg.*, 363 U.S. at 567, 578; *see also Bowen*, 459 U.S. at 224; John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964).

42. 28 U.S.C. § 1441(b) (1982); *see infra* note 104.

43. 379 U.S. 650 (1965).

44. *Id.* at 652 (emphasis in original); *accord* Clayton v. United Automobile Workers, 451 U.S. 679, 681, 689, 696 (1981) (setting out three part test for when an employee must exhaust internal union appeal procedures); *cf.* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 380-81 (1974) (injunction lies under § 301 where the union has violated a no-strike pledge and the dispute is arbitrable under the agreement); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 250-51 (1970) (same).

contract resulting from the employer's failure to provide severance pay allegedly owed under the collective agreement, without first seeking redress under the grievance and arbitration provisions of the agreement.[45] The trial court found for Maddox, and the Alabama Supreme Court affirmed, reasoning that state law did not require exhaustion and that state law controlled in suits seeking severance pay. The state court found that federal labor policy would not be offended, "since, with the employment relationship necessarily ended, no further danger of industrial strife exists warranting the application of federal labor law."[46]

Despite an impassioned dissent by Justice Black,[47] the Court rejected the Alabama court's ruling that severance pay grievances were sufficiently different in kind from other grievances to permit departure from the general rule requiring exhaustion. Justice Harlan, writing for the Court, reasoned that, even though Maddox by hypothesis had accepted his discharge as final, severance pay grievances would nevertheless affect future relations between the employer and employees. Thus, sounding a theme that has become ubiquitous in section 301 doctrine, the Court opined that to excuse the employee from exhausting all the process available under the collective agreement would deter the employer from entering into arbitration clauses when negotiating future agreements.[48] Additionally, the dispute was cognizable under the agreement. Justice Harlan wrote that "no positive reasons appear why the federal rule should not apply. . . . Maddox' suit . . . is simply on the contract, and the remedy sought . . . did not differ from any that the grievance procedure had the power to provide."[49]

Finally, the Court believed that the requirement of exhaustion was mandated by the intent of Congress in enacting the LMRA. Exhaustion was a necessary incident of federal labor law policy, because administration of the grievance procedure fosters loyalty to the union and furthers industrial stability.

> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. . . . [C]onscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved em-

45. *Maddox*, 379 U.S. at 650-51.

46. *Id.* at 651 (citations omitted).

47. *Id.* at 659. Justice Black wrote a powerful dissent, lamenting the loss of the ancient common law individual right to sue for breach of contract and suggesting that the deprivation of this right might be violative of the Constitution. *Id.* at 659, 663, 664, 667, 669-70. Justice Black asserted that Charlie Maddox was but a captive of the union, who could have waived his common law right to seek judicial redress only by a "cruel fiction." *Id.* at 664-65. Justice Black issued a similar dissent in *Vaca v. Sipes*, 386 U.S. 171, 203 (1967).

48. *Maddox*, 379 U.S. at 656; *see* cases cited *supra* at note 44.

49. 379 U.S. at 657.

> ployees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit . . . would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. . . .[50]

Harry must distinguish his case from *Maddox*. Whereas Maddox immediately went to state court, Harry at least made an "*attempt* [to] use the contract grievance procedure" prior to filing suit. After all, Harry was perfectly willing to have his dispute settled by the exclusive remedies set forth in the agreement. It was the union that refused to arbitrate his grievance.

But this avenue of argument was foreclosed by the Supreme Court in the seminal case of *Vaca v. Sipes*.[51] The Court held that no "individual employee has an absolute right to have his grievance taken to arbitration."[52] In *Vaca*, the employee, Benjamin Owens, like Harry, had sought redress through the grievance procedure, and attempted without success to persuade the union to arbitrate his grievance.[53] The Court nevertheless reversed the Missouri Supreme Court, which had affirmed a jury verdict finding that Owens was wrongfully discharged.[54] In deciding that the union, not the individual grievant, "owns" the grievance if the collective agreement so provides,[55] the Court raised the spectre of destruction of the grievance and arbitration machinery were the individual to control the fate of his grievance.

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery . . . would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. . . .[56]

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50. *Id.* at 653.

51. 386 U.S. 171 (1967).

52. *Id.* at 191.

53. *Id.* at 175-76.

54. *Id.* at 176.

55. *Id.* at 191. *But see* Summers, *The Contract of Employment*, *supra* note 2, at 1093 ("The basic premise of *Smith, Humphrey, Vaca* and *Hines*, that individual employees have contractual rights under collective agreements, leads to . . . [a] subordinate propositio[n] . . . [that] the union does not 'own' the grievance."). The vast majority of labor agreements do indeed vest unions with exclusive control over the grievance procedure, at least at the vital point of submission *vel non* to arbitration. Feller, *supra* note 18, at 752-53, 814 n.595; *see* McDonald v. City of West Branch, 466 U.S. 284, 291 (1984); Bowen v. United States Postal Serv., 459 U.S. 212, 225 n.14 (1983).

56. *Vaca*, 386 U.S. at 191-92. The Court adopted the views expressed by Professor Cox in *Rights*, *supra* note 40, at 621-24. For an interesting commentary positing that, both as a matter of

The effect of the Court's holding, however, is not quite as draconian as it appears to individual grievants. The Court also recognized that, "because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant."[57] Thus, the Court further held that if the union has exclusive authority to invoke the arbitration procedure, and the union has wrongfully refused to process the grievance, the employee-plaintiff may seek redress in the state or federal courts without exhausting the grievance machinery. That is, the employee may bring suit against both the union and the employer, if (but only if) the union has breached its duty of fair representation toward the grievant by conduct that is "arbitrary, discriminatory, or in bad faith."[58]

As a result of *Vaca*, Harry may amend his complaint to allege a breach of the collective agreement and to join the union as a defendant in his suit. But he will prevail only if he is able to prove in the first instance that UHW breached its duty of fair representation, *and* that Giant's discharge violated the labor contract.[59] The difficulty here is Harry is unlikely to be able to shoulder the nearly Herculean burden of showing the union's conduct to be arbitrary, discriminatory or in bad faith. Even if

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statutory construction and as a matter of policy, individual employees must be permitted to control their own grievances, see Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975).

57. *Vaca*, 386 U.S. at 185.

58. *Id.* at 190. The majority also "accept[ed] the proposition that a union may not *arbitrarily* ignore a meritorious grievance or process it in a perfunctory fashion." *Id.* at 191 (emphasis added). The Court originally recognized that unions have a duty fairly to represent its members in a Railway Labor Act case. Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944). The duty of fair representation was first found to attach to unions that represented employees in industries within the purview of the NLRA in Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) and Syres v. Oil Workers Int'l Union, Local 23, 350 U.S. 892 (1955) (mem. per curiam). *See also* Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976) (union's duty is "to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct"); Humphrey v. Moore, 375 U.S. 335, 348 (1964) (holding no breach of the duty of fair representation absent "substantial evidence of fraud, deceitful action or dishonest conduct"). For an excellent overview of the development and history of the doctrine, see Gregory, *A Call for Supreme Court Clarification of the Union Duty of Fair Representation*, 29 ST. LOUIS U.L.J. 45, 53-65 (1984) and Aaron, *The Duty of Fair Representation: An Overview*, in THE DUTY OF FAIR REPRESENTATION 8-16 (J. McKelvey ed. 1977).

Although the Court rejected petitioner's preemption argument that the NLRB should have primary and exclusive jurisdiction with respect to duty of fair representation cases, the Court in *Vaca* implicitly seemed to endorse the NLRB decision in Miranda Fuel, 140 N.L.R.B. 181 (1962) (a breach of the duty of fair representation was an unfair labor practice), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). *Id.* at 179-87. To this day, however, the Court expressly has refused to reach the question. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 170 (1983).

59. *Vaca* and the *Maddox* exhaustion rule make plain that courts should not review the merits of the discharge unless the plaintiff has first met her burden of making out a breach of the duty of fair representation. *Vaca*, 386 U.S. at 183-87. The Court expressly rejected the holding of the Missouri court that proof on the merits of the employee's grievance was sufficient to make out a breach of the union's duty. *Id.* at 192-93; *see DelCostello*, 462 U.S. at 166-67; *Bowen*, 459 U.S. at 221-22; Aaron, *supra* note 58, at 39; Feller, *supra* note 18, at 703, 809.

there were not the problem of the "obey, then grieve rule," it is plain that the UHW may take into consideration its financial wherewithal in making a determination as to whether to arbitrate Harry's grievance.[60] In fact, the union need not always consider the merits of a grievance in making a determination respecting arbitration.[61]

Thus, at this point in our story, it appears that Harry's failure to convince the union official to arbitrate his case, as a result of *Vaca* and *Maddox*, results in a Giant victory on the summary judgment motion.

B. Section 301 Doctrine and the Gardner-Denver *Exception to Exhaustion and Finality*

As his principal line of defense to Giant's summary judgment mo-

60. *E.g.*, Curth v. Faraday, Inc., 401 F. Supp. 678, 681 (E.D. Mich. 1975); Encina v. Tony Lama Co., 316 F. Supp. 239, 245 (W.D. Tex. 1970), *aff'd per curiam*, 448 F.2d 1264 (5th Cir. 1971).

61. *Vaca*, 386 U.S. at 190, 194-95; Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 742 (1981); *see, e.g.*, Seymour v. Olin Corp., 666 F.2d 202, 208 (5th Cir. 1982); Findley v. Jones Motor Freight, 639 F.2d 953, 956 (3d Cir. 1981); Simberland v. Long Island R.R., 421 F.2d 1219, 1226-27 (2d Cir. 1970); Union News Co. v. Hildreth, 295 F.2d 658, 660-61 (6th Cir. 1961), *cert. denied*, 382 U.S. 884 (1965); Gregory, *supra* note 58, at 58 n.52; VanderVelde, *supra* note 40, at 1100; Feller, *supra* note 18, at 702-03, 809; Aaron, *supra* note 58, at 39. *But cf.* Harrison v. United Transp. Union, 530 F.2d 558, 561 (4th Cir. 1981) (showing that the grievance has merit may provide circumstantial evidence of a breach of the duty of fair representation by a union that fails to process the grievance).

The lower courts are divided as to whether mere negligence suffices or whether a showing of union hostility is necessary to make out a breach of the duty of fair representation. *Compare* Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir. 1983) *and* Ruzicka v. General Motors Corp., 523 F.2d 306, 311 (6th Cir. 1975), *modified* 649 F.2d 1207 (6th Cir. 1981), *cert. denied*, 464 U.S. 982 (1983) *with* Graf v. Elgin, J. & E.R.R., 697 F.2d 771, 778 (7th Cir. 1983) (Posner, J.), Hoffman v. Lonza, Inc., 658 F.2d 519, 522-23 (7th Cir. 1981) *and* Coe v. United Rubber Workers, 571 F.2d 1349, 1350-51 (5th Cir. 1978). For an exhaustive analysis and overview of the division and disarray in the lower courts see, e.g., Gregory, *supra* note 58, at 66-76. Commentators, lamenting the lower courts' confusion about *Vaca*, have vigorously urged the Court to clarify the doctrine and to strengthen the duty of fair representation standard to provide for greater respect for individual rights. *See, e.g., id.*; Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1121 (1973); Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89, 104-05 (1985); Harper & Lupu, *supra* note 40; VanderVelde, *supra* note 40, at 1084, 1096-98, 1115-17; Note, IBEW v. Foust: *A Hint of Negligence in the Duty of Fair Representation*, 32 HASTINGS L.J. 1041, 1052, 1070 (1981); Comment, *Protection of Individual Rights in Collective Bargaining: The Need for a More Definitive Standard of Fair Representation Within the* Vaca *Doctrine*, 14 VILL. L. REV. 484 (1969).

Despite this doctrinal chaos in the lower courts, it is nevertheless clear that unions have exceptionally wide latitude with respect to making a determination whether or not to arbitrate an individual's grievance. *Id.*; *see supra* notes 60-61 and accompanying text. Thus, the Court has noted that a breach of the duty of fair representation may be difficult to demonstrate. *See infra* note 74 and accompanying text; *see also* Jones, *Time For a Mid-Course Correction*, in THE CHANGING LAW OF FAIR REPRESENTATION 223, 270-71 (J. McKelvey ed. 1985) (of 1285 DFR decisions surveyed using Lexis, from 1965-1982, individual plaintiff's prevailed in only 176 cases); Freed, Polsby & Spitzer, *Unions, Fairness and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 463, 463-64 n.2 (1983). Commentators have also suggested that a breach of the duty of fair representation is particularly difficult to establish respecting the decision of how far to press the grievances. Goldberg, *supra*, at 134, 136; Harper & Lupu, *supra* note 40, at 1277; *see* Feller, *supra* note 18, at 811-12, 852; VanderVelde, *supra* note 40, at 1085 n.8.

tion, Harry will assert that his case should be controlled by the principles and reasoning in *Alexander v. Gardner-Denver*[62] and its progeny. In *Gardner-Denver* the union lost an arbitration on behalf of a black employee who alleged that he was discharged without just cause and in violation of a nondiscrimination clause in the contract.[63] The agreement provided that the arbitral procedure was final and binding on the parties, and the issue of the alleged discrimination was before the arbitrator.[64] When the employee sought to bring suit alleging a violation of Title VII,[65] the district court held that, as a result of the arbitration award, the plaintiff was foreclosed from bringing suit. The Tenth Circuit affirmed. The courts below relied on the federal labor policy favoring the private arbitration of disputes arising during the term of the agreement as announced by the Court in *Lincoln Mills* and the *Trilogy*.[66]

But Justice Powell, writing for a unanimous Court, rejected the notion that exhaustion had any role to play with respect to an alleged Title VII violation.[67] The Court held that an employee could bring suit following an adverse arbitral award[68] and that an employee need not exhaust the remedies available in the collective bargaining agreement prior to bringing a Title VII action.[69]

The Court first reasoned that Congress intended Title VII to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination."[70] Justice Powell noted that Congress intended the private rights accorded under Title VII to be nonwaivable and a pivotal part of the enforcement scheme.[71] Additionally, rights that accrue under Title VII and rights provided in the collective agreement

62. 415 U.S. 36 (1974).

63. *Id.* at 39 & n.2, 42.

64. *Id.* at 41-42, 43 n.4.

65. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

66. *Gardner-Denver*, 415 U.S. at 43, 45-46; *see supra* text at notes 29-32, 36-41.

67. 415 U.S. at 49 & n.10, 51 n.14.

68. *Id.* at 49. This was not the first time the Court had held that a unionized employee had judicial recourse to seek vindication of a federal statutory right following an adverse arbitral award. United States Bulk Carriers v. Arguelles, 400 U.S. 351, 357 (1971) (Seaman's Wage Act, 46 U.S.C. § 596 (1970)); McKinney v. Missouri-K.T.R. Co., 357 U.S. 265, 268-70 (1958) (Universal Military Training and Service Act, 50 U.S.C. § 459 (1950)); *see* Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984) (Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1381 (1982)); Marshall v. N.L. Indus., 618 F.2d 1220 (7th Cir. 1970) (Occupational Health and Safety Act of 1970, 29 U.S.C. § 651-78 (1976 & Supp. V 1981)); Brennan v. Alan Wood Steel Co., 1975-76 O.S.H. Dec. (CCH) ¶ 20,136, at 23,958 (E.D. Pa. 1975).

69. 415 U.S. at 52.

70. *Id.* at 48-49.

71. *Id.* at 51. Thus, the Court rejected "the proposition that petitioner waived his cause of action under Title VII" when the union submitted his grievance to arbitration. In contrast to some waivable NLRA rights, which are "conferred on employees collectively to foster *the process of collective-bargaining* . . . Title VII . . . stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities." *Id.* (emphasis added); *see also Arguelles*, 400 U.S. at 361-62 (Harlan, J. concurring).

"have legally independent origins and are equally available to the aggrieved employee."[72] Justice Powell explained that

> [i]n submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.[73]

The Court reasoned, moreover, that arbitral proceedings could not be relied on to protect the independent, private rights of a Title VII litigant. Unions not only have "exclusive control over the manner and extent to which an individual grievance is presented," but furthermore "a breach of the union's duty of fair representation may prove difficult to establish."[74] Additionally, the Court was troubled because the arbitrator "must interpret and apply th[e] agreement in accordance with the 'industrial common law of the shop,' " and "[t]he arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties."[75] The Court was also less than confident of the ability of an arbitral proceeding to protect an individual's Title VII rights because of "the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,"[76] and the Justices expressed concern that arbitrators often are not lawyers.[77] Justice Powell added that arbitration proceedings do not comport with judicial norms in many respects.

> [T]he factfinding process in arbitration [is usually] not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited.[78]

Finally, the Court dismissed the suggestion that its holding would sound the "death knell" for arbitration provisions because they would no longer be attractive to employers. While conceding that the duplication of remedies would not be costless, the Court reasoned that the em-

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72. 415 U.S. at 52.

73. *Id.* at 49-50.

74. *Id.* at 58 n.19.

75. *Id.* at 53. The Court continued: "If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of the enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Id.* (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

76. *Id.* at 57.

77. *Id.* at 57 n.18.

78. *Id.* at 57-58 (citation omitted). The Court also recognized that " '[a]rbitrators have no obligation to the court to give their reasons for an award.' " *Id.* at 58 (quoting, *Enterprise Wheel*, 363 U.S. at 598). For a comprehensive overview of the arbitral decisionmaking process and the use of evidence in arbitration proceedings see F. ELKOURI & E. ELKOURI, *supra* note 17, at 222-341.

ployer's desire to exact a no-strike pledge in exchange for arbitration would continue to provide sufficient incentive to induce employers to agree to arbitration provisions.[79] Further, because of the relative speed and inexpense of arbitral proceedings, the unanimous Court believed that employees would continue to have sufficient inducement to seek vindication through the arbitral forum.[80]

The Court in three later decisions extended the reasoning of *Gardner-Denver* to claims brought by individual employees under the Fair Labor Standards Act (FLSA),[81] the Civil Rights Act of 1871[82] and the Federal Employers' Liability Act.[83] While relying on congressional intent to allow the assertion of FLSA claims in both arbitral and judicial forums, in *Barrentine v. Arkansas-Best Freight System* the Court reemphasized the independent nature of the statutory claim. Justice Brennan, writing for the majority, stressed that "[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[84] Therefore, the Court held that employees could not be confined to the remedies provided in the agreement, because "[i]n sum, the FLSA rights petitioners seek to assert in this action are independent of the collective-bargaining process." Rather, "[t]hey devolve on petitioners as individual workers, not as members of a collective organization [and]

79. 415 U.S. at 54-55 (citation omitted). *See supra* note 31 and accompanying text, and cases cited *supra* at notes 33, 41.

80. 415 U.S. at 54-55. The Court's prediction has stood the test of time. Dire warnings from the litigants and others that the result achieved in *Gardner-Denver* would mark the death of arbitration proved premature and unduly pessimistic. *See* Brief for the Respondent, at 25 (predicting that an adverse result permitting multiple forums would "brin[g] about the tragic demise" of arbitration); Brief of the Chamber of Commerce for the Respondent as *amicus curiae*, at 7; Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. ANN. MEETING NAT'L ACAD. ARB. 97 (1976). Empirical data show that an overwhelming majority of employers continue to agree to arbitration provisions. In fact, the number of agreements containing arbitration clauses has actually *increased* since *Gardner-Denver* was decided, from 94% to 97%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS—ARBITRATION PROCEDURES 1475-76 (1966); *see supra* note 9.

As to the weight accorded to arbitral awards in Title VII litigation, the Court concluded that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 60. In a footnote, the Court set out a number of considerations for determining the proper weight and relevancy to be given to an arbitral award in Title VII suits. *Id.* at 60,, n.21; *see also* McDonald v. City of West Branch, 466 U.S. 284 n.13 (1984); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 743-44 n.22 (1981).

81. 29 U.S.C. §§ 201-219 (1985); *Barrentine*, 450 U.S. at 728.

82. 42 U.S.C. § 1983 (1979); *McDonald*, 466 U.S. 284.

83. 45 U.S.C. §§ 51-60 (1982); Atchison, T. & S.F. Ry. v. Buell, 107 S. Ct. 1410 (1987).

84. *Barrantine*, 450 U.S. at 737. The Court noted, for example, that a union could decide not to press an employee's meritorious FLSA claim to arbitration without committing a breach of the duty of fair representation. *Id.* at 742. Moreover, the Court again recognized that the arbiter was compelled to enforce the agreement, even if at odds with the statute. *Id.* at 744.

[t]hey are not waivable."[85]

Harry will posit that *Gardner-Denver* and its progeny are controlling, notwithstanding that the Court, in a formal sense, was engaged in a project of harmonizing two seemingly conflicting federal statutes. While the Court purported to rely on congressional intent in its reasoning and holding, the enterprise in fact more accurately involved an effort to determine the policies that animated the statutes at issue. This project that "may be characterized as the divination of congressional purpose, but . . . is [really] an identification of policies and balancing of interests"[86] is ubiquitous throughout the Court's decisions involving section 301 and preemption doctrine.

Consequently, Harry credibly can assert that his state claims are analogous to the individual federal statutory rights at issue in *Gardner-Denver* and its progeny. His state law claims alleging wrongful discharge in violation of public policy and breach of the implied covenant of good faith and fair dealing are traceable to state law providing nonwaivable individual rights that arise independently of the agreement, and therefore are not within the reach of section 301. Giant will respond that *Gardner-Denver* and *Barrentine* are inapposite, because Harry's claims are based upon state not federal law, and because his cause of action asserting a violation of the implied covenant of good faith and fair dealing does not find its origin in a statute.[87] In sum, Giant will posit that *Gardner-Denver* involved accommodating two conflicting federal statutes, thus not invoking a straight problem of "preemption."

Several commentators have protested that *Gardner-Denver* and its progeny are distinguishable from cases in which state law is at issue, because the Court there was purporting to interpret congressional will in an effort to harmonize the NLRA and another federal statute.[88] But the underlying reasoning and thrust of the Court's exegesis suggests that the

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85. *Id.* at 745.

86. Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 648 (1961); *see* 2 C. MORRIS, THE DEVELOPING LABOR LAW 1508 (2d ed. 1983); Cox, *Legal Nature, supra* note 40, at 25-26. In the face of congressional silence regarding both the reach of preemption and of § 301, the Court has had no choice but to attempt to discern the primary evils to which the statute was aimed and to act accordingly. *See* Michelman, *supra*, at 681; *infra* text at notes 242-44.

87. *See infra* notes 207-10 and accompanying text.

88. Grossman, *NLRA Preemption of Wrongful Discharge Actions: A Perspective*, 1 LAB. LAW. 583, 590 (1985); Kinyon & Rohlik, *"Deflouring" Lucas Through Labored Characterizations: Tort Actions of Unionized Employees*, 30 ST. LOUIS U.L.J. 1, 30 (1985); *see* Pincus & Gillman, *The Common Law Contract and Tort Rights of Union Employees: What Effect After the Demise of the "At-Will" Doctrine?*, 59 CHI.-KENT L. REV. 1007, 1015 & n.42 (1983); Wheeler & Browne, *Preemption of Wrongful Discharge Claims of Employees Covered by Collective Bargaining Agreements*, 1 LAB. LAW. 593, 605-06 (1985). The article authored by Messrs. Wheeler and Browne was reprinted in slightly revised form following the Court's decision in *Metropolitan Life*. Wheeler & Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1 (1986) [hereinafter Wheeler & Browne (Revised)].

independent, nonwaivable rights analysis is apposite to claims irrespective of whether based on federal or state law. Indeed a somewhat obscure and less than complete earlier Supreme Court opinion suggests as much. In *Colorado Anti-Discrimination Commission v. Continental Air Lines*,[89] the Court held that a claim arising under a state anti-discrimination statute[90] antedating Title VII was not preempted by the RLA.[91]

The only two courts of appeals to have addressed the issue expressly held that, because the employee asserted a claim alleging a violation of public policy found in a state statute independent of the collective agreement, the remedies available in the labor agreement were immaterial.[92] Both courts used a bifurcated doctrinal approach to find that the plaintiffs were not limited to the redress provided by the labor agreement: finding the state law claims were controlled by the *Gardner-Denver* exception to exhaustion, and holding the state causes of action were not preempted.

In *Peabody-Galion v. A.V. Dollar*,[93] the employer laid off thirty-four employees after they successfully had filed workers' compensation claims. When the union lost two arbitrations, all the affected employees joined a diversity action in federal district court, alleging wrongful discharge in violation of the Oklahoma Workers' Compensation Act,[94] a claim sounding in tort.[95] The employer moved for summary judgment, arguing that the plaintiffs should be confined to the exclusive remedies provided in the contract and that the state claims should be preempted. The court first turned to the question of preemption. In a somewhat rambling and confused exposition, the court found the claims not preempted, reasoning that the claims were not within the primary jurisdiction of the NLRB.[96]

The court then turned its attention to whether the federal labor policy favoring arbitration precluded the employees' assertion of the state statutory claims. Relying on *Gardner-Denver* and *Barrentine*, the court held that the employees were not confined to the remedies provided by the agreement, because the claims asserted were "substantive rights that

89. 372 U.S. 714 (1963).

90. COLO. REV. STAT. § 80-24-6 (Supp. 1960).

91. 372 U.S. at 724.

92. Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); Peabody-Galion v. A.V. Dollar, 666 F.2d 1309 (10th Cir. 1981). For district court and state court opinions in accord, see, *e.g.*, Messenger v. Volkswagen of America, 585 F. Supp. 565, 569 (S.D. W. Va. 1986); Thomas v. Kroger Co., 583 F. Supp. 1031, 1033-35 (S.D. W. Va. 1984); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280, 1284 (1984), *cert. denied*, 472 U.S. 1032, *cert. denied*, 106 S. Ct. 278 (1985).

93. 666 F.2d 1309 (10th Cir. 1981).

94. OKLA. STAT. Tit. 85, §§ 5-7 (Supp. 1980).

95. 666 F.2d at 1311-13.

96. *Id.* at 1313-19; *see, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959); *see also infra* note 121 and accompanying text.

devolve on workers individually, not collectively, and may not be waived under collective bargaining agreements."[97] Furthermore, the claims were "not based on rights arising out of the collective bargaining agreement."[98] Finally, the court rejected the suggestion that *Gardner-Denver* and *Barrentine* were distinguishable because "the independent remedy arises under state law rather than federal."[99] The court reasoned "that the statute here, like the Federal Labor Standards Act provides substantive minimum protection to individual workers, protections that are not to be abridged by contract."[100] The court thus concluded that, as in *Barrentine* and *Gardner-Denver*, the arbitral mechanism was exclusively controlled by the union, and the arbiter lacked the institutional capacity to interpret and to enforce state law. Therefore, the private dispute resolution process provided in the agreement was ill-suited to protect the independent and nonwaivable state statutory rights at issue.[101]

In *Garibaldi v. Lucky Food Stores*,[102] the employee-plaintiff brought suit in state court for wrongful termination in violation of state public policy after an arbitrator had determined that he was fired for just cause pursuant to the agreement. Garibaldi alleged that Lucky Stores effected his discharge because, contrary to the orders of his supervisor, he contacted the local health department to notify them he was delivering a load of spoiled milk.[103] Lucky Stores removed the suit to federal court, arguing that Garibaldi's action was an "artfully pled" section 301 claim, arising under federal law.[104] Lucky Stores also moved for summary

97. 666 F.2d at 1321.

98. *Id.*

99. *Id.*

100. *Id.* at 1322.

101. *Id.* at 1322-23.

102. 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).

103. *Id.* at 1368.

104. *Id.* The essence of the "artful pleading" doctrine is that irrespective of how the plaintiff characterizes the claim in her complaint, if the "true nature" of the claim when "properly characterized" is within the scope of § 301, the defendant may remove the case to federal court; the claim, if within § 301, presents a federal question. 28 U.S.C. § 1441(b) (1976); Avco Corp. v. Aero Lodge, 735, Int'l Ass'n of Machinists, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968); *see, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542 (1987); Franchise Tax Bd. v. Construction Laborers, Vacation Trust Fund, 463 U.S. 1, 10 (1983); United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen, 452 U.S. 615 (1981); *supra* text accompanying notes 30, 33. *See generally* 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, at 266-79 (1985). To put the problem concretely, if a unionized employee pleads in state court a "straight" breach of an employment contract without reference to some independent state law right that may be the source of the claim, the action is removable. *Infra* text at note 178; *see, e.g.*, Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987); Eitmann v. New Orleans Pub. Serv., Inc., 730 F.2d 359 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 435 (1986); Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1211-12 (9th Cir. 1980). Removal is thought to be inextricably linked to original federal question jurisdiction, and the "artful pleading" doctrine is a "corollary" to the well-pleaded complaint rule where Congress has manifested an intent to preempt the entire field. *Caterpillar*, 107 S. Ct. at 2430; *Taylor*, 107 S. Ct. at 1546; 28 U.S.C. § 1331 (1980); *see* Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Fair v. Kohler Die & Specialty Co., 228 U.S. 25 (1913); Louisville & N.R.R. v. Mottley, 211

judgment, alleging that the statute of limitations for bringing a suit under section 301 had run.[105]

The Ninth Circuit first held the claim not preempted.[106] The court reasoned that the state statute was a law of general applicability.[107] After noting that the sale or delivery of adulterated milk was expressly proscribed by California statute,[108] the court elaborated that Garibaldi's claim was not preempted because

> [a] claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the bargaining process; it does not alter the economic relationship between the employer and the employee. The remedy is in *tort*, distinct from any contractual remedy an employee may have under the collective bargaining contract. It furthers the state's interest in protecting the general public—an interest which transcends the employment relationship.[109]

The court then confronted the issue of whether Garibaldi's unsuccessful arbitration prevented his assertion of the state claims. Citing *Gardner-Denver*, the court found that, because the state law claim was not preempted, Garibaldi's adverse arbitral award did not bar assertion of his independently based state claim.[110] The court dismissed Lucky Stores' attempt to distinguish *Gardner-Denver* as inapposite to preemption analysis.

> First, the focus of *Alexander* was the preclusive effect of arbitration, not the pre-emptive effect of federal law—a supremacy clause issue. Second,

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U.S. 149, 152 (1908). *See generally* Note, *Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634 (1984).

105. 726 F.2d at 1369. If the case is held within § 301 or preempted by federal labor law, then wrongful discharge plaintiffs, when suing both the union and employer in a "hybrid" breach of contract-duty of fair representation action, face a six month statute of limitations. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 155, 172 (1983). Many employer-defendants and a few courts, including apparently the *Garibaldi* court, have forgotten that in an ordinary breach of contract action against only the employer, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), is still good law. 726 F.2d at 1369 n.3. Consequently, the proper approach is not to apply the *DelCostello* six-month rule implied from § 10(b), 29 U.S.C. § 160(b) (1982), of the NLRA, but to find and to borrow the most appropriate state statute of limitations. *Hoosier Cardinal*, 383 U.S. at 707.

106. 726 F.2d at 1369.

107. The court relied on the plurality opinion in New York Telephone Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979). *See infra* text at notes 139-151. In finding Garibaldi's claim not preempted, the court purported to balance the state and federal interests involved, relying on Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977). To the extent the court in fact relied on *Farmer* and attempted to weigh the state and federal policies, its reliance was misplaced. *See infra* note 121 and accompanying text; *infra* text at notes 159-61, 209.

108. 726 F.2d at 1374; CAL. AGRIC. CODE § 32906 (West 1968).

109. 726 F.2d at 1375 (citation omitted) (emphasis in original). The court's assertion that the claim does not change the economic relationship between the employer and employee seems to me less than accurate and somewhat disingenuous. Any creation of an employee's right regarding her working conditions, if previously there was no right, ineluctably must alter the balance of bargaining power between the two. *But see* Summers, *Time For A Statute, supra* note 2, at 530. In any event, that is beside the point. *See infra* text at note 200.

110. 726 F.2d at 1375-76.

> the Supreme Court held in *Colorado Anti-Discrimination Comm'n v. Continental Airlines,* [sic] *Inc.* . . . that a discrimination action under Colorado law was not pre-empted by the RLA.[111]

Harry asserted a cause of action alleging violation of state public policy. He was able to point to a specific state statute. Consequently, relying on *Gardner-Denver* and *Barrentine* as construed by *Peabody-Galion* and *Garibaldi*, Harry should prevail on his claim with a statutory basis. That is, Harry can now argue with considerable force that his state statutory claim is not within the ambit of section 301. Therefore, Harry's failure to exhaust the grievance and arbitration procedure in the agreement is inconsequential.

Before reaching Giant's alternative assertion, that even if not an "artfully pled" section 301 claim, the state claims are preempted, we should first examine Harry's common law claim—that his discharge breached the implied covenant of good faith and fair dealing. Both the Tenth Circuit in *Peabody-Galion*[112] and the Ninth Circuit in *Garibaldi*[113] suggested that if the plaintiffs could not point to a specific state statute, they would be confined to the remedies provided in the agreement. Most lower courts facing the issue mistakenly[114] agreed that unionized workers asserting causes of action not expressed or implied in state statutes were restricted to the grievance and arbitration process.[115]

Illustrative of these cases is *Moore v. General Motors.*[116] There, a unionized worker sold her house in St. Louis and purchased a home in Bowling Green, Kentucky, when instructed to report to the Kentucky plant. When GM abruptly withdrew its instructions to report to Kentucky, Moore sued GM for misrepresentation and fraud without attempting to invoke the grievance and arbitration process.[117] The Eighth Circuit had little trouble finding Moore's claim grounded on state decisional law preempted. The court reasoned that "the complaint essentially arises from an employment contract between her and GM that was entered into pursuant to an agreement between GM and the union," and since the "right evolves from the Collective Bargaining Agreement, . . . [it] is governed by federal law, not state tort law."[118]

Thus, Harry's claim predicated on state common law would seem to

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111. *Id.* at 1375 n.13.

112. 666 F.2d at 1321.

113. 726 F.2d at 1374.

114. *See infra* text at notes 207-10.

115. *See, e.g.*, Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984); Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir. 1984); Bertrand v. Quincy Mkt. Cold Storage & Warehouse Co., 728 F.2d 568 (1st Cir. 1984); Delisi v. United Parcel Serv., 116 L.R.R.M. (BNA) 2912 (W.D. Pa. 1984); Bradmon v. Ford Motor Co., No. 78-70913 (E.D. Mich. Nov. 14, 1980).

116. 739 F.2d 311 (8th Cir. 1984).

117. *Id.* at 313.

118. *Id.* at 315, 316.

rest on shaky ground at best. Moreover, if the lower courts had applied to Harry's suit the proper branch of preemption doctrine prior to *Lueck* and *Metropolitan Life*, it is likely that his statutory claim would not have survived as well. Preemption doctrine of that period must be examined next.

C. *Preemption Doctrine Prior to* Lueck *and* Metropolitan Life*: Bargaining Process Preemption and* Teamsters v. Oliver

In cases in which a unionized worker seeks to bring a state wrongful discharge action, preemption analysis must begin with *Local 20, Teamsters v. Morton*[119] and *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*.[120] The appropriate inquiry is whether the state law at issue interferes with the process of collective bargaining, not whether the conduct at issue is within the primary jurisdiction of the Board.[121] State law must yield, not because the con-

119. 377 U.S. 252 (1964).

120. 427 U.S. 132 (1976).

121. In the landmark case of *San Diego Building Trades Council v. Garmon*, the court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national labor policy is to be averted." 359 U.S. 236, 245 (1959).

The purpose of the *Garmon* doctrine is to protect the primary jurisdiction of the Board in unfair labor practice proceedings. Because independently based wrongful discharge claims filed by unionized employees will rarely involve affirmative conduct or concerted activity that is arguably protected or prohibited by the Act, the *Garmon* branch of preemption doctrine has little relevance to the ability of unionized workers to bring state wrongful discharge actions.

In *Lueck* and *Metropolitan Life*, the Court dismissed *Garmon* preemption as irrelevant to the analysis. *See infra* notes 167, 196. Nevertheless, it has been suggested that state wrongful discharge actions often may be preempted under the *Garmon* doctrine. Wheeler & Browne, *supra* note 88, at 615-16. These commentators press the argument that the *Garmon* doctrine is apt, relying on the Supreme Court's opinion in NLRB v. City Disposal Sys., 465 U.S. 822, 830-31 (1984) (an individual employee's assertion of a right rooted in the collective agreement is protected, concerted activity within the meaning of § 7 of the Act), *affirming* Interboro Contractors, 157 N.L.R.B. 1295, 1298 (1966), *enf'd* 388 F.2d 495 (2d Cir. 1967). However, if a court applying the test developed by *Lueck* and *Metropolitan Life* finds the cause of action not preempted because the right springs independently of the agreement, the employee must be asserting a state right derived from a source other than the contract, thereby rendering *City Disposal Systems* and the *Interboro* doctrine inapposite.

Arguably state wrongful discharge claims that do not involve concerted activity are not preempted under the primary jurisdiction rationale, because they are "a merely peripheral concern of the . . . Act." *Garmon*, 359 U.S. at 243; *see* Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (no preemption of state court action brought by permanent replacements whom were displaced by former strikers, alleging misrepresentation and breach of contract against the employer, because the replacements allegedly were promised permanent employment regardless of whether the strikers returned to work). The Court has also found no preemption where "the regulatd conduct touch[es] interests . . . deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244; *see* Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977) (action not preempted brought in state court by union member against union and its officials alleging intentional infliction of emotional distress, where claim is unrelated to employment discrimination and plaintiff can show actual damages); Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (defamation action not preempted, provided defamatory statements are circulated with knowledge or reckless disregard of their falsity); Automobile Workers v. Russell, 356 U.S. 634 (1958) (state court award of damages against union for mass picketing and

duct the state seeks to regulate is arguably protected or prohibited by the NLRA, but because "Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' "[122] The initial thrust of the *Machinists* doctrine was to preempt state laws that tend to disarm the economic weapons that unions and employers use in order to pressure each other during the bargaining process.

In *Machinists*, the Wisconsin Supreme Court had affirmed a lower court decision, which enforced a cease and desist order issued by the Wisconsin Employment Relations Commission enjoining a refusal by unionized workers to work overtime. The workers hoped that their job action would obtain a more favorable agreement.[123] The Supreme Court reversed.

The Court recognized that, even though not within the ambit of section 7 or section 8 and therefore not within the primary jurisdiction of the NLRB, thus implicating the *Garmon* doctrine, Congress intended some activities of self-help to remain unregulated by any governmental entity. The majority described "the crucial inquiry regarding pre-emption" as " 'whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' "[124] Reasoning that the employer had sought aid from the state in order to bolster its bargaining position, the Court concluded that the state law must give way because "Wisconsin '[entered] into the substantive aspects of the *bargaining process* to an extent Congress has not countenanced.' "[125]

If "state attempts to influence the substantive terms of collective bargaining agreements"[126] by interfering with the bargaining process are incompatible with the NLRA, inexorably, if almost too easily, it would seem to follow that state law purporting to regulate directly the substan-

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threats that deterred plaintiff from crossing picket line to report to work not preempted); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (state injunction against mass picketing not preempted); United Constr. Workers v. LaBurnum Constr. Corp., 347 U.S. 656 (1954) (state court award of damages for tortious conduct involving violence and threats during a labor dispute not preempted).

A state wrongful discharge action should be preempted under the *Garmon* primary-jurisdiction rationale only if the activity itself, independently of its source, is protected or prohibited by the Act. *See, e.g.*, Viestenz v. Fleming Cos., 681 F.2d 699, 701-04 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982); *cf.* International Longshoremen's Ass'n v. Davis, 106 S. Ct. 1904 (1986). In the typical wrongful discharge action in which the employee is discharged for violating an employer's rule rather than for engaging in conduct that arguably asserts an affirmative right under the agreement, *Garmon* generally has no place in the analysis.

122. *Machinists*, 427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

123. *Id.* at 135-36.

124. *Id.* at 147-48 (quoting Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

125. *Id.* at 149 (emphasis added) (quoting NLRB v. Insurance Agents, 361 U.S. 477, 495 (1960)).

126. *Id.* at 153.

tive terms of the bargain must yield as well. Indeed, in sweeping dicta in *Local 24, Teamsters v. Oliver*,[127] the Court determined as much.

All that was at issue in *Oliver* was the application of an Ohio anti-trust law.[128] The state statute prohibited the terms of the collective agreement at issue, providing for a minimum rental rate for truck drivers who leased trucks to their employers.[129] The Court's holding that the Ohio law must yield was hardly exceptional; Justice Brennan wrote that "[l]ittle extended discussion is necessary to show that Ohio law cannot be so applied."[130] Yet, the sweeping propositions contained in the next few pages of the Court's opinion proved to be among the most contentious in the convoluted and circuitous history of labor law preemption doctrine.

The Court held not only that a collective agreement respecting mandatory subjects of bargaining had the force of federal law, but additionally that the states could not promulgate any laws "conflicting" with the terms of the bargain.

> We believe that there is no room in this scheme for the application . . . of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. . . . [T]he paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make rather than in terms in an enactment of Congress. . . If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects . . . it is for Congress, not the States, to provide it.[131]

One can argue forcefully that this purported conflict reflects one of the many flaws of the *Oliver* reasoning.[132] Collective bargaining has

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127. 358 U.S. 283 (1959).

128. OHIO REV. CODE ANN. §§ 1331.01-.14 (Anderson 1953).

129. 358 U.S. at 284-85.

130. *Id.* at 295. In fact, in an earlier case the Court had held that a state anti-trust law was preempted by the NLRA. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

131. 358 U.S. at 296-97 (citations omitted). The only apparent exceptions were "local health and safety laws." *Id.* at 297.

132. Professor Cox suggested that the language in *Oliver* was "manifestly broader than required to decide the only issue that was before the Court." Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 298 (1980). Cox continued that the terms of the contract providing for the minimum rental rate were found by the Ohio courts to be violative of anti-trust laws, but

> [t]he state had formulated no policy with respect to those subjects, save that they should not be fixed by collective bargaining. It was, in short, the *method* to which the state objected. The NLRA prescribed a method that the state attempted to proscribe. Obviously, the state law had to yield, but there was no occasion to decide whether an employer and the representatives of its employees can by agreement override a state law fixing a substantive term or condition of employment for employers and employees without regard to how their relations are conducted.

Id. (emphasis in original). For an interesting commentary suggesting that the *Oliver* approach to preemption doctrine results in an unlawful delegation by Congress of federal power to private parties

nearly always taken place enmeshed within a web of legal rules, both state and federal, which mandate minimum substantive outcomes. State laws that seek to provide a minimum substantive floor of benefits to protect all workers irrespective of union status do not in a real sense interfere with freedom of contract or add to the terms of the agreement—unless one believes, for example, that the 13th Amendment's ban on slavery and peonage[133] or state and federal laws forbidding child labor really interfere with free collective bargaining and freedom of contract. A more accurate characterization of state laws that mandate minimum benefit levels to workers irrespective of any agreement is that the state law simply ignores any bargains made to the contrary.

Nearly twenty years later, the Court was again confronted with a state law that purported to supersede the terms of a collective bargaining agreement. While this time it was the agreement that yielded to state law, the Court in *Malone v. White Motor Corp.*[134] seemed careful to distinguish *Oliver*. The Court reasoned that Congress had not intended to preempt state law concerning pensions, as revealed in federal legislation that preceded ERISA.[135]

Although one scholar waxed optimistic in the belief that *Malone* at least indicated a significant narrowing of *Oliver*,[136] *Oliver* plainly remained good law until *Lueck* and *Metropolitan Life*. Indeed, the Court needlessly went out of its way to embrace and reaffirm the *Oliver* dicta in *Alessi v. Raybestos Manhattan, Inc.*, declaring labor agreements to be "expressions of federal law."[137]

In the meantime, the Court was occupied with an alternative approach to preemption, permitting state laws to survive that were of general applicability—state laws promulgated without regard to "any appraisal of the special interests of employers, labor unions, and employees in union organization or collective bargaining."[138] In *New York Tele-*

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see Note, *Private Preemption of State Labor Laws: A Constitutional Objection*, 58 TEX. L. REV. 1099 (1980).

133. *See* Bailey v. Alabama, 219 U.S. 219 (1911).

134. 435 U.S. 497 (1978).

135. *Id.* at 512-14; 72 Stat. 997 (1958), *repealed by* Employment Retirement Income Security Act of 1974 § 111(a)(1), 29 U.S.C. § 1031(a)(1) (1982).

136. Cox, *supra* note 132, at 299-300. *But see* Note, *Constitutional Review: Supreme Court October, 1977 Term*, 6 HASTINGS CONST. L.Q. 19, 227-28 (1978) (asserting that *Malone* merely created an exception to *Oliver* with no generative power).

137. 451 U.S. 504, 525-26 & nn.22-23 (1981). *Alessi* was in the main an ERISA preemption case, and the parties did not even brief the questions relating to preemption of a provision of the New Jersey worker's compensation scheme under the NLRA. Rather, the court of appeals raised the issue sua sponte, and for some reason, the Supreme Court felt compelled, without the benefit of briefs or argument, to affirm the court of appeals' NLRA preemption holding relying on *Oliver*. *Id.*

138. Cox, *supra* note 132, at 281-82. Professor Cox first suggested the concept in *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1330-31 (1954) [hereinafter Cox, *Federalism*]; *see also* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1355-56, (1972). Professor Cox addressed the distinction between state laws that provide substantive benefits to individual

phone v. New York State Department of Labor,[139] although a majority of the Court agreed that the New York Unemployment Act[140] providing unemployment benefits to strikers after seven weeks on the picket line should not be preempted, there were four separate opinions representing at least three different approaches to the problem.

The plurality opinion, authored by Justice Stevens, inquired as to whether the challenged statute was a law of general applicability.[141] Even though the plurality found that the New York scheme altered the balance of the bargaining power between the parties, the plurality distinguished *Morton* and *Machinists*, because the unemployment compensation act at issue "is not a 'state la[w] regulating the relations between employees, their union, and their employer,' as to which the reasons underlying the pre-emption doctrine have their 'greatest force.' "[142] Rather, "the statute is a law of general applicability."[143] The plurality would have held that a state statute that passes muster as a law of general application should not be preempted unless the party seeking to strike down the state scheme could show a " 'compelling congressional direction . . . [to] depriv[e] the States of the power to act.' "[144] Since the plurality could discern no "compelling congressional direction" in the legislative histories of the NLRA or the Social Security Act to oust state law in the area of unemployment benefits, they found the state scheme immune from attack.[145]

Justice Brennan, concurring in the result, was not "at ease" with this test.[146] Justice Brennan, moreover, found it unnecessary to decide the propriety of the test, since he found the principles of *Machinists* and *Morton* controlling and insufficient legislative evidence showing congressional will to preempt state unemployment laws under any test.[147]

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workers and state regulations that interfere with the bargaining process. At the core, the test is easy to apply. For example, suppose a state promulgates a law that mandates a duty to bargain in good faith regarding all employment contracts. Although the state law may be aimed at improving the substantive wages and working conditions of workers, few would disagree with the notion that it impermissibly tampers with the process of bargaining. And of course, the duty to bargain in good faith, unlike the substance of the agreement reached by the parties, was of direct concern to Congress. §§ 8(a)(5), 8(d), 29 U.S.C. §§ 158(a), 158(d) (1982); *cf.* H.K. Porter v. NLRB, 397 U.S. 99 (1970); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960). At the margins, there are hard cases, and arguably state laws aimed at preventing wrongful discharges, to the extent that they disrupt the arbitration process, present such cases. *See infra* notes 285-90 and accompanying text.

139. 440 U.S. 519 (1979).

140. N.Y. LAB. LAW §§ 590(7), 592(1) (McKinney 1977 & Supp. 1978-79).

141. 440 U.S. at 533. Justices White and Rehnquist joined the plurality opinion.

142. *Id.* (quoting Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 193 (1978)).

143. *Id.*

144. *Id.* at 540 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

145. *Id.* at 541-45.

146. *Id.* at 546.

147. *Id.* at 546-47.

Justice Blackmun, with whom Justice Marshall concurred in the judgment that Congress did not intend to preempt the New York statute, nevertheless sharply disagreed with the plurality's effort to distinguish *Machinists* and *Morton*. It could not be gainsaid that the statute "does indeed alter the economic balance between labor and management."[148] Justice Blackmun was particularly disturbed by the necessity of showing a compelling congressional direction to find the state law preempted, finding it a reversal of the presumption previously announced in *Machinists*.[149]

Finally, Justice Powell, with whom Chief Justice Burger and Justice Stewart dissented, found the law not to be one of general applicability, arguing that the focus of the plurality was too general. The dissent argued that the proper focus should have been on the particular provision of the statute affording unemployment benefits to striking workers, rather than on the New York statute generally.[150] The dissent posited that even were the act one of general application, its generality would have little to do with its preemption *vel non*. The law might, and in this case actually did, vitiate congressional policy.[151]

New York Telephone obviously affords Harry little comfort. *Oliver* strips Harry of his state remedies and, under traditional principles of common law, his rights.[152] Harry therefore would lose his case, had the Court not reversed direction in *Lueck* and *Metropolitan Life*, by embracing and even going beyond the general application test.

III

LUECK AND *METROPOLITAN LIFE*: THE NONWAIVABLE, INDEPENDENT, INDIVIDUALLY-BASED RIGHTS TEST

Commentators and courts that have attempted to resolve the perceived conflict between state laws purporting to allow unionized workers to assert wrongful discharge actions and federal labor policy presump-

148. *Id.* at 547.

149. *Id.* at 548.

150. *Id.* at 557.

151. *Id.* at 557-58, 560-67.

152. Wheeler & Browne, *supra* note 88, at 598 (it follows from *Oliver* and *Malone* that "the states are without power to impose either implied-in-law or implied-in-fact *contractual terms on the parties*"). *See also* Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635, 649 (1983) ("under the *Oliver-Malone* rule all wrongful discharge claims would be preempted"); Note, *State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption*, 71 CALIF. L. REV. 942, 969, 971 (1983) (same).

The two notes, written prior to *Lueck* and *Metropolitan Life*, while finding the *Gardner-Denver* reasoning helpful in determining whether to preempt wrongful discharge claims, would draw the line at public policy actions based on the weight of the state interest in the assertion of the action relative to the federal interest in noninterference with the terms of the contract. Comment, *supra*, at 640, 657-62, 663-64; Note, *supra*, at 966-73.

tively favoring arbitration have ultimately resorted to concepts rooted in federalism. In an effort to ascertain whether or not unionized workers should be permitted to bring state wrongful discharge actions, these courts and commentators have attempted to balance the importance of the state interest against the federal labor policy favoring the exclusive use of the private dispute resolution machinery in the collective agreement.[153]

Preemption doctrine is anchored in the Supremacy Clause,[154] and necessarily involves a tension between state and federal regulatory schemes. Although apparently unrecognized or given short shrift by some analysts, the states' desire to accord substantive rights to individual employees[155] is often an animating source of the turbulent conflict over the role of "Our Federalism" in the scheme of government.[156] *Lueck* and *Metropolitan Life* make manifest that wrongful discharge actions brought by unionized workers cannot be assessed by resorting to this amorphous balancing test. Weighing competing federal and state interests will not suffice to satisfy congressional intent; the *weight* of the state's interest is of little relevance. Either the state scheme interferes with federal labor law or it does not. State-created individual job security rights that emanate apart from the collective process and are not waivable do not unduly fetter the federal scheme by restraining the collective process. Thus, if scrutiny reveals that the state intended to accord to individual employees nonwaivable substantive rights that are not predicated on the existence of the collective agreement, the assertion of those individual rights should be permitted.

Two 1985 insurance cases, *Lueck* and *Metropolitan Life*, both written by Justice Blackmun for a unanimous Court,[157] mark the first time in labor law preemption doctrine that the assertion of nonnegotiable, individual rights arising independently of the agreement has not only been considered explicitly by the court, but also has become a first order principle and the fulcrum of the Court's analysis.

In *Lueck*, the employee-plaintiff, a member of the United Auto Workers, suffered a non-occupational injury, and alleged that his insurance disability payments were periodically and unjustly interrupted.[158] Without first seeking to utilize the grievance and arbitration procedure

153. *See, e.g.*, cases and commentary cited *supra* at notes 92, 152.

154. U.S. CONST. art. VI; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

155. By use of the term "individual rights," I mean to demarcate, as does the Court, individual entitlements found in state positive law, both statutory and judge-made, that provide individual employees substantive nonnegotiable benefits, from laws that vest in workers collectively and thus foster the collective process.

156. *See* Cox, *Federalism, supra* note 138, at 1333-34; Hays, *Federalism and Labor Relations in the United States*, 102 U. PA. L. REV. 959, 961-62 (1954).

157. Both cases were decided 8-0. An ailing Justice Powell did not participate.

158. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 203-05 (1985). Lueck also brought suit

provided in the labor agreement, Lueck filed suit in Wisconsin state court against his employer, Allis-Chalmers. Lueck sought to recover in tort, claiming that Allis-Chalmers in bad faith repeatedly denied his disability insurance claims.[159] The disability plan was expressly made a part of the collective agreement, and disputes concerning payments of the plan were specifically subject to the grievance and arbitration provisions of the contract.[160] The Wisconsin Supreme Court reversed a decision by the state court of appeals granting summary judgment to Allis-Chalmers.[161]

The Wisconsin Supreme Court saw the questions presented as first: whether Lueck's claim fell within section 301, thus requiring exhaustion of the grievance procedure, and second: if the cause of action emanated from state law, whether it was preempted by federal labor law. The court in a 2-1 decision answered both questions in the negative, and held that Lueck could proceed with his tort action in state court.[162]

Turning first to section 301, the Wisconsin Supreme Court found federal law inapposite because the tort of bad faith arises as a claim independently of the labor agreement.[163] The court relied on past state cases, where "[i]n establishing the precise nature of the bad faith claim, we emphasized that 'the tort of bad faith is not a tortious breach of contract.' " Rather " '[i]t is a separate intentional wrong which results from a breach of duty imposed as a consequence of the relationship established by the contract.' "[164] While the court acknowledged that the duty initially arose as a result of the agreement, it rejected defendants' assertion that the tort was "inextricably intertwined" with the contract.[165] The majority held that "[t]he specific violation of the labor contract, if there was one, is irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim," because "Lueck would have to pursue a separate claim and remedy for any breach of contract."[166]

Next turning to the issue of preemption, the court held that the state-created tort action was not ousted under the *Garmon* doctrine.[167]

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against the insurance carrier. Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 562, 342 N.W.2d 699, 701 (1984).

159. 471 U.S. at 203-05.

160. *Id.*

161. 116 Wis. 2d at 564, 342 N.W.2d at 701.

162. *Id.*

163. *Id.* at 565, 345 N.W.2d at 702.

164. *Id.* (quoting Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 687, 271 N.W.2d 368, 374 (1978)).

165. *Id.* at 566, 345 N.W.2d at 702-03.

166. *Id.* at 566, 345 N.W.2d at 703.

167. *Id.* at 566-76, 345 N.W.2d at 703-08. The Supreme Court admonished the state court for its use of the *Garmon* doctrine, because the *Machinists* branch of preemption doctrine supplied the proper point of departure for analyzing the issue before the court. 471 U.S. at 213-14 n.9; *see supra* note 121 and accompanying text.

In its poorly reasoned and somewhat disjointed opinion, the court further fleshed out the basis of its determination as to the independent nature of the tort claim. The court noted that a claim of bad faith sounding in tort could arise even if there were only a breach of the insurance contract and no breach of the collective bargaining agreement. Thus, the court reasoned that the claim could be adjudicated without interpretation of the labor agreement.[168] Additionally, the court erroneously reasoned, the duty of good faith "in the labor agreement context means that the parties must agree to the specific terms of the labor agreement." In contrast, "good faith in the insurance context means that the insurer has a separate duty to deal reasonably with its insured," and not merely to adhere to the express provisions of the insurance contract.[169]

The dissenting justice embraced the method of analysis utilized by the majority, but his reading of state law yielded a different result: The cause of action must be within the scope of section 301, "[b]ecause any duty allegedly violated by Allis-Chalmers . . . was specifically created by the labor contract, *and would not exist absent* such contract."[170] Thus, what the state court majority failed to understand, but both the dissent and the Supreme Court recognized, is that, but for the duty to provide disability insurance in the first instance, a duty that arose only as a result of the terms of the collective agreement, there would be no duty to provide the disability payment in good faith. All the jurists understood the legal saliency of the "but for" relationship, but the majority in the state court failed as a matter of fact to comprehend the derivative nature of the right.

The Supreme Court reversed the state court. What is remarkable about the Court's opinion is not its conclusion, but its reasoning. The Court held "that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a [section] 301 claim . . . or dismissed as pre-empted by federal labor-contract law."[171] While reversing the court below, the Court carefully suggested

168. 116 Wis. 2d at 574, 345 N.W.2d at 707.

169. *Id.* at 567, 345 N.W.2d at 704.

170. *Id.* at 578, 345 N.W.2d at 708 (Steinmetz, J. dissenting) (emphasis in the original).

171. 471 U.S. at 220. The Court cited Avco Corp. v. Aero Lodge, 735, 390 U.S. 557 (1968). In *Avco*, the Court held that a suit seeking to enjoin a union from striking in violation of a no-strike clause in an agreement arises under federal law within the meaning of 28 U.S.C. § 1441(b), and is thus removable to federal court. 390 U.S. at 560. That holding of the *Lueck* Court is indicative of one enigma lurking in the opinion. The holding is framed in the disjunctive, the alternatives being either preemption or treatment as a § 301 claim. Yet in other parts of the opinion the Court spoke in terms of a state claim being preempted under § 301. 471 U.S. at 210-11. To frame "preemption" under § 301 as a question in search of an answer is a non sequitur. Ever since *Lincoln Mills* it has been plain that the rule of decision in § 301 actions is supplied by federal common law with full preemptive force. *Avco*, 390 U.S. at 559-60; *see* Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542, 1546-47 (1987); *supra* text at notes 29-32.

that cases in which unionized employees seek to assert state wrongful discharge claims[172] require close analysis, and therefore the Court's opinion attempted to give guidance to the courts below.

The Court framed the question presented as whether application of the Wisconsin tort of bad faith would interfere with the federal scheme established by section 301.[173] First, the Court noted that, as a result of the supremacy clause, where it conflicts with federal law, state law, of course, must give way.[174] Congressional intent supplied the measure for divination of whether or not there was such a conflict. Justice Blackmun wrote that the " 'purpose of Congress is the ultimate touchstone.' "[175] But where Congress has been silent regarding the state law at issue, then the local regulation will be sustained " 'unless it conflicts with federal law or would frustrate the federal scheme.' "[176]

The Court then went to the heart of the problem. Quoting liberally from *Lucas Flour*, Justice Blackmun emphasized that the importance of uniformity in contract interpretation required the application of federal law in section 301 disputes.[177] Therefore, as Justice Blackmun correctly pointed out, the pleadings cannot be dispositive with respect to whether a suit is preempted under section 301:

> Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over

172. It is true that all that was before the Court was a tort claim alleging bad faith in the handling of an insurance claim. But the Court was well aware of what was coming next. The petitioner, Allis-Chalmers, invoking a "parade of horribles," stressed that "courts may apply analogous tort theories to a broad spectrum of other collective bargaining rights. . . . For example, one local jurisdiction may assert a deeply rooted concern in the fairness in which an employer effects discharge and discipline. . . ." Petition for the Writ of *Certiorari* at 11; *see also* Brief in Support of Petition for Writ of *Certiorari* of the Chamber of Commerce as *amicus curiae* at 9-10 & n.14; Brief of Chamber of Commerce at 14 & n.15. The Court responded to these arguments by noting that, if the state court decision were permitted to stand, the *Maddox* exhaustion rule would be eviscerated in "[c]laims involving vacation, work assignment, [and] *unfair discharge*." 471 U.S. at 219-20 (emphasis added).

173. 471 U.S. at 208-09.

174. *Id.*

175. *Id.* (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schemerhorn, 375 U.S. 96, 103 (1963))).

176. *Id.* at 209 (quoting *Malone*, 435 U.S. at 504). One of the interesting aspects of the opinion is that the presumption favoring the survival of state law is adopted from the plurality opinion in *New York Telephone*. It was this formulation that caused Justice Blackmun to refuse to join the plurality opinion as being unfaithful to the *Machinists* test. *See supra* text at note 149. Indeed, the presumption as to preemption has been reversed, I think, because of the Court's realization that the state regulatory scheme is aimed at providing substantive benefits to all individual workers regardless of union status and ignores the terms of any collective bargaining agreements. The state simply is attempting to afford workers individual as opposed to collective rights, in contrast to cases like *Machinists* that concern state attempts to regulate the collective bargaining process.

177. 471 U.S. at 209-10. The Court also relied on *Lincoln Mills*, *see supra* text at notes 29-32.

> substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.[178]

But the Court warned that not all disputes relating to employment, or remotely concerning a provision of a collective bargaining agreement, are preempted. Rather, relying on *Malone* and *Gardner-Denver*, Justice Blackmun reasoned that if the preemptive reach of section 301 were so limitless as "to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract," the result would be incongruent with congressional intent.[179] Only those "rights" that are capable of consensual waiver were preempted, as opposed to "an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement. . . ."[180] In sum, while the Court declined to make express its opinion as to the outcome of a case in which the state cause of action was independent of the labor contract,[181] the "analysis must focus . . . on whether the . . . tort action . . . confers non-negotiable state law rights . . . independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract."[182] Finally, after engaging in extensive analysis of state law, the Court properly concluded that the state court's holding that the claim was independent of the contract was erroneous. The duty of good faith could arise only as a result of the agreement, which created the right to insurance in the first instance.[183]

The court reiterated that to allow the assertion of "*derivative* tort claims" in state court would undermine the federal policy favoring arbitration.[184] But the Court emphasized that the test was *not* one of mere cognizability under the agreement, overruling sub silentio the broad dicta of *Oliver*. Justice Blackmun wrote that there is no

> suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever

178. 471 U.S. at 211. *See also supra* note 171.

179. 471 U.S. at 212 & nn.7-8. Thus, the Court rejected arguments by the litigants that *Gardner-Denver* and its progeny were irrelevant, because the cases involved accommodation rather than preemption. Petitioner's Brief at 14-15 n.16; Brief of the Chamber of Commerce on behalf of Petitioner as *amicus curiae* at 9-10.

180. 471 U.S. at 213 n.8.

181. *Id.* at 217 n.11.

182. *Id.* at 213.

183. *Id.* at 216. The Court opined that the extent of the duty to act in good faith "ultimately depends upon the terms of the agreement," and thus is "tightly bound with questions of contract interpretation that must be left to federal law." *Id.*

184. *Id.* at 219-20 (emphasis added). The Court cited *Warrior & Gulf, Lucas Flour*, and *Maddox* for the proposition that Congress intended the NLRA to embrace a strong presumption in favor of private dispute resolution. *See supra* notes 31, 34-35, 41 and accompanying text.

> state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct or establish rights and obligations independent of a labor contract.[185]

In one commentary written before *Metropolitan Life*, the authors expressed disbelief that *Oliver* could have died a silent and unnoticed death in *Lueck*.[186] But *Metropolitan Life* should have clarified the issue.[187] Justice Blackmun stated in *Lueck* that "[t]he full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."[188] That form took on more shape later in the term.

In *Metropolitan Life*, Justice Blackmun not only drove home the point that the sweeping *Oliver* dicta were no longer good law, but also that the test laid out in *Gardner-Denver* and *Barrentine*, not requiring exhaustion when an employee seeks to assert an action grounded in individually-based rights independent of the agreement, plays a pivotal, if not a preeminent, role in preemption analysis. At issue was a Massachusetts statute[189] mandating that all group health insurance plans contain minimum mental health coverage for employees without regard to union status. The Massachusetts Attorney General brought suit against the insurance carriers, seeking an injunction and declaratory relief to enforce the state statute. The Massachusetts Supreme Judicial Court granted the relief sought, and the Supreme Court affirmed.[190]

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185. 471 U.S. at 211-12 (emphasis added).

186. Wheeler & Browne, *supra* note 88, at 598 n.18. These commentators were acting with chagrin and surprise to the Court's wholly accurate statement that:

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.

471 U.S. at 211-12.

187. In the wake of *Metropolitan Life*, Messrs. Wheeler and Brown appear unable to decide whether *Oliver* is still good law. Wheeler & Browne (Revised), *supra* note 88, at 10-11. They attempt to place the unmistakable language in *Metropolitan Life* within the health and safety exception carved out by the *Oliver* Court. *Id.* at 11; *see supra* note 131, *infra* notes 189-97 and accompanying text. Yet they acknowledge that the *Metropolitan Life* Court probably discarded the *Oliver* dicta, accusing the Court of "cavalier treatment" of the misguided case. Wheeler & Browne (Revised), *supra* note 88, at 11.

188. 471 U.S. at 220. This is a common refrain in labor preemption cases. *See* Machinists v. Gonzales, 356 U.S. 617, 619 (1958) (congressional intent regarding preemption possesses a "Delphic nature, to be translated into concreteness by the process of litigating elucidation"); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955) (the scope of preemption "can be rendered progressively clear only by the course of litigation").

189. MASS. GEN. L. ANN. ch. 175, § 47B (West Supp. 1985).

190. Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724 (1985).

Appellants-insurers rested their NLRA preemption argument[191] on the twin pillars of *Oliver*[192] and *H.K. Porter v. NLRB*.[193] Appellants asserted that the Massachusetts Act prescribing minimum insurance benefits interfered with the substance of uniform, multistate collective agreements, which are " 'exclusively a federal concern' "[194] and thus directly conflicted with the concept of freedom of contract—" 'the fundamental premise' on which labor law is based."[195]

The Court accepted the appellants' premise that the state insurance law effectively altered the substantive terms of the agreement, but then framed the inquiry as "whether this kind of interference with collective bargaining is forbidden by federal law."[196] The Court dismissed appellants' reliance on the dicta in *Oliver* and *Alessi* as having merely "surface plausibility."[197] The Court then turned to appellants' argument that "Congress' ultimate concern in the NLRA was in leaving the parties free to reach agreement about contract terms."[198] The Court rejected the assertion because "[t]he NLRA is primarily concerned with establishing an equitable *process* for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck. . . ."[199] Justice Blackmun reasoned that redressing inequality of

191. Appellants also argued that the Massachusetts statute was preempted by ERISA, an argument that the Court likewise rejected. In fact, the case was and continues to be viewed by practitioners mainly as an ERISA preemption case, which may help to explain why the lower courts have ignored *Metropolitan Life* in the context of NLRA preemption.

192. Local 24, International Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959). The petitioners cited *Oliver* and *Alessi* no less than ten times in the twenty-five pages of their brief devoted to NLRA preemption.

193. 397 U.S. 99 (1970). *H.K. Porter* stands for the proposition that the *NLRB* may not impose substantive terms on an agreement for which the parties did not bargain. Together with *Oliver, H.K. Porter* had been thought to embrace the notion that Congress mandated that the states may not promulgate laws providing substantive benefits that establish a minimum floor in the context of collective bargaining. But, as Justice Blackmun pointed out, evidence that Congress did not intend *the Board* to interfere with the substantive terms of the bargain does not resolve the question whether the *states* may afford minimum substantive terms to all employees, notwithstanding the terms of labor contracts. In fact, as Justice Blackmun concluded, the spirit of Congress captured in *H.K. Porter* indicates that, in enacting the NLRA, Congress was not concerned with the outcome of the bargaining process, only with the process utilized by the parties in arriving at the bargain. 471 U.S. at 753-55; *see infra* note 199 and accompanying text.

194. Brief for Appellant at 16 (quoting Alessi v. Raybestos Manhattan, Inc., 451 U.S. 504, 526 (1981)).

195. *Id.* (quoting *H.K. Porter*, 397 U.S. at 108).

196. 471 U.S. at 748. The Court again dismissed *Garmon* preemption as inapposite. *Id.* at 748 & n.26.

197. *Id.* at 752-53.

198. *Id.* at 752.

199. *Id.* at 753 (emphasis added). The Court endorsed the views of Professor Cox expressed in *Recent Developments, supra* note 132, at 297, in which he further developed the theory that a state statute should not be preempted if it withstood a test of general applicability. Cox asserted that "[p]utting matters of union security to one side, all substantive terms and conditions of employment are equally 'peripheral' to NLRA policy." *Id.* Referring to *Oliver*, Professor Cox concluded that "[f]ree from direct precedent, I would have supposed that the NLRA leaves the states free to regu-

bargaining power was among the primary purposes of the Act.

> The evil Congress was addressing . . . was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated . . . so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA."[200]

The Court then in no uncertain terms extended the *Barrentine-Gardner-Denver* reasoning to preemption analysis. Citing the two cases, the opinion concluded that "it never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees," and the Court could "see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards."[201] The Court explained that state-created independent, individual rights were not an impediment to federal labor law policy.

> Minimum state labor standards affect union and nonunion employees equally and neither encourage nor discourage the collective bargaining processes that are the subject of the NLRA. . . . Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive" the mandated health insurance coverage. . . . Nor do these laws even inadvertantly affect these interests implicated in the NLRA. [T]hey are minimum standards "independent of the collective bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization."[202]

Additionally, the Court discerned that allowing unions and employers to enter into agreements contrary to state-mandatory benefit laws would subvert the underlying premises of the NLRA. "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards

late employment conditions, provided that the state legislation does not discriminate against collective bargaining." *Id.; see* Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2222-23 (1987); Golden State Transit Corp. v. City of Los Angeles, 106 S. Ct. 1395, 1399-1400 (1986).

200. 471 U.S. at 754-55. Thus, the Court found without merit appellants' assertion that "this case is a fortiori to cases like *Morton, Machinists* and *New York Telephone*." *Id.* at 752-53.

201. *Id.* at 755 (emphasis in original).

202. *Id.* (emphasis and brackets in original) (quoting Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 739 (1981)).

on non-union employers."[203] Furthermore, the Court could not find any evidence that Congress intended the NLRA to be more than interstitial, displacing state law only where application of the state's law prevented effectuation of the Act's purposes. Finally, the states' broad police power to establish minimum standards was part of the context in which the Wagner Act was passed.[204]

Thus, *Lueck* and *Metropolitan Life* read together mark a dramatic shift in emphasis in labor law preemption doctrine. The Court's express incorporation of *Gardner-Denver* and *Barrentine* demonstrates that the touchstone of preemption is the distinction between collective rights, traceable to the agreement, and nonwaivable, individually-based rights that originate in state law independently of the agreement. In *Metropolitan Life*, the Court for the first time embraced the essence of the general applicability test. The Court's vision of a different industrial order in which substantive rights created by the states play an increasingly salient role in protecting individual workers transformed what had been a plurality of three into a unanimity of eight. The Court endorsed the notion that the proper test for preemption included a determination of whether the state scheme involved "appraisal of the special interests of employers, and labor unions in union organization and collective bargaining."

Several general principles can be distilled from these two foundational cases.

(i) Mere cognizability under the grievance procedure is not a sufficient condition to preempt the cause of action and to require exhaustion.[205]

(ii) The proper test determines whether the cause of action would arise but for the existence of the labor agreement.

(iii) If the claim is merely derivative of the contract, as in *Lueck* itself, whether pled in tort or contract, it must be preempted and the unionized employee will be confined to any remedies provided in her agreement. That is, if the state claim is predicated on the existence of the agreement, or is negotiable, it must be preempted.

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203. *Id.* at 756.

204. *Id.* at 756-57. *See Fort Halifax Packing Co.*, 107 S. Ct. at 2222-23; *Golden State Transit Corp.*, 106 S. Ct. at 1400.

205. Had the court meant the test to be one of cognizability, it simply could have reiterated the test in *Maddox*. *See supra* text at note 49. Alternatively, Justice Blackmun could have written that "[t]he critical inquiry is . . . whether the controversy presented to the state court is identical to . . . or different from that which could have been . . . presented to the [arbitrator]." Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197 (1978). Had the Court meant the touchstone to be whether the state cause of action overlapped with the contract or whether the labor agreement provided protection equivalent to that afforded by the state law, it had no dearth of ready-made formulations from which to choose. *See also* Andrews v. Louisville & N.R.R., 406 U.S. 320, 324 (1972) (cause of action for wrongful discharge preempted because the only source of plaintiff's right not to be discharged at-will is the collective bargaining agreement).

(iv) The state law must not substantially frustrate federal labor policy, express or implied in the NLRA.[206]

Let us examine some hypothetical cases, turning first to the familiar claims filed by Harry against Giant, to see how these principles apply. Harry pled two causes of action: a tort claim alleging a violation of public policy premised on the state's anti-polygraph statute and a "contract" claim alleging breach of the implied covenant of good faith and fair dealing.

Under the principles adduced above, Harry's public policy claim grounded on the state anti-polygraph statute should survive. A state law that establishes a minimum substantive floor for workers survives preemption. Here, the state simply has erected a floor of job security, irrespective of union status. That the state right of action ignores the

206. Two recent opinions of the Supreme Court—Caterpillar Inc. v. Williams, 107 S. Ct. 2425 (1987) and IBEW v. Hechler, 107 S. Ct. 2161 (1987)—reaffirm these principles. In *Caterpillar*, the plaintiffs alleged that their employer promised them permanent employment while they were working in managerial positions outside the bargaining unit. When the plaintiffs were demoted, returned to the bargaining unit, and then fired, they brought suit in state court alleging, *inter alia*, breach of individual employment contracts. Caterpillar removed the claim to federal court, and, reversing the district court, the Ninth Circuit held that the claim did not "arise under" § 301 and thus was not removable. Williams v. Caterpillar Tractor Co., 786 F.2d 928 (9th Cir. 1986), *aff'd*, *Caterpillar*, 107 S. Ct. 2425 (1987).

Although it soundly rejected the Ninth Circuit's intimation that cognizability under the collective agreement was relevant to this inquiry, 107 S. Ct. at 2429 n.4, the Supreme Court affirmed. The court reasoned that

> [s]ection 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially dependent on analysis of a collective-bargaining agreement." *Electrical Workers v. Hechler*, [107 S. Ct. at 2166-67]; *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Respondents allege that Caterpillar has entered into and breached *individual* employment contracts with them. Section 301 says nothing about the content or validity of individual employment contracts.

107 S. Ct. at 2431 (emphasis in original).

Surprisingly, the Court in dicta noted that not "all individual employment contracts are subsumed into, or eliminated by, the collective-bargaining agreement." *Id.* If the Court really means what it says, this represents a startling narrowing of J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), which merits further consideration beyond the scope of this Article. The Court, however, left open the possibility, to be decided in the first instance in state court, that such contracts may be preempted under the *Garmon* or *Machinists* doctrines or that, by entering into an individual employment contract that conflicts with the collective agreement, the employer may have violated the principle of exclusive representation. 107 S. Ct. at 2432-33 & nn.12-13.

In *Hechler*, the plaintiff brought suit in state court against her union after suffering an occupational injury. Hechler alleged that the union had breached its state law duty of care by not providing her with adequate training and a safe workplace. The Eleventh Circuit held that Hechler's negligence claim was not preempted and therefore must be remanded, reversing the district court. Hechler v. IBEW, 772 F.2d 788 (11th Cir. 1985), *rev'd*, 107 S. Ct. 2161 (1987).

The Supreme Court reversed, holding that Hechler's claim was preempted under § 301. The Court reasoned that, under state law, it was the employer that—by virtue of the employment relationship itself—owed Hechler a duty of care. 107 S. Ct. at 2167. By contrast, Hechler's "allegations of negligence [against the union] assume significance if—and only if—the Union, in fact, [through collective bargaining] had assumed the duty of care." *Id.* at 2168. Thus, because, but for the collective agreement, Hechler's state law "rights" against the union would vanish, the Court concluded that the claim must be treated as a § 301 claim. *Id.*

substantive terms of the agreement negotiated by the parties and may be aimed at redressing lack of equipoise is of no moment. Further, the "obey, then grieve rule" is of no consequence, even though this implicit term of the agreement arguably conflicts with state law.

Moreover, Harry's claim would exist whether or not his terms and conditions of employment were set forth in a labor agreement. We know this for several reasons. Sally is not covered by a labor agreement, yet she prevailed in her suit against Giant. The state right of action implied from the statute, unlike the tort at issue in *Lueck*, makes no implicit reference to the existence *vel non* of a contract and is not subject to individual negotiation or waiver. The law unconditionally proscribes the use of polygraph tests by employers, regardless of whether the worker has any sort of employment contract.

A distinction might be drawn between those state actions based on statutes and those based on state common law, such as Harry's claim alleging a breach of the implied covenant of good faith and fair dealing. Some lower courts[207] and commentators[208] have asserted that the source of the cause of action should play a vital, if not dispositive, role in determining whether to allow the assertion of a state wrongful discharge action by unionized employees. These courts and analysts apparently believe that state actions with a statutory basis are more authoritative than state actions with a common law basis. Apparently, they perceive the codification of the right of action as an indication of the seriousness with which the state regards the right at issue.

This assertion is flawed on two counts. First, the Court in *Lueck* and *Metropolitan Life* stressed that preemption, in this context, is not a question of balancing state and federal concerns. The weight of the state's interest is to be considered only insofar as it is either an aid in determining whether Congress intended to preempt the law or evidence

207. *See supra* notes 112-18 and accompanying text.

208. Pincus & Gillman, *supra* note 88, at 1015 n.42; Wheeler & Browne, *supra* note 88, at 609, 611; *see* Kinyon & Rohlik, *supra* note 88, at 45. Wheeler & Browne posit that judicially-created claims against wrongful discharge are somehow sui generis. They claim that when "the legislature has defined retaliatory discharge [it has defined it] as an offense against the state." By contrast, "when a court creates a retaliatory discharge action, it is defining the wrong solely as a private one, so that the state's interest is not nearly as compelling." Wheeler & Browne (Revised), *supra* note 88, at 36. It may be the case that most state legislatures, and not courts, *in theory* are empowered to act in the public interest and to define what is in the public interest. But, as a practical matter, common law precedent creates a law of general application every bit as "public" as if the legislature had created the action by statute. In short, Wheeler & Browne's argument simply ignores the historical development of the common law. *Cf.* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1169-77 (the importance that either the state or the litigants attach to any particular action cannot be determined by distinguishing between criminal and civil contexts).

of frustration of the federal scheme.[209] Second, and more fundamentally, one cannot credibly assert that the measure of a state's interest in a legal rule is a function of codification. For example, it simply would be nonsensical to posit that those states retaining common law crimes are "less interested" in criminal enforcement than states in which the legislatures have promulgated criminal codes. At bottom, an attempt to measure the weight of the state's interest by reference to its code wrongly assumes that the states subscribe to the federal separation of powers model, which accords the overwhelming preponderance of law-making power to the legislative branch and consciously refrains from encouraging the growth of unfettered federal common law. Thus, the attempt to distinguish wrongful discharge actions based on a state statute from wrongful discharge actions founded in state decisional law harkens back to the days of *Swift v. Tyson*.[210]

Still, Harry's claim alleging a breach of the implied covenant of good faith and fair dealing, which in Massachusetts is styled as a contract claim,[211] is a more problematical case. At first blush, this case seems indistinguishable from *Lueck*, because the covenant must be founded on some contract. Thus, regardless of whether pled in tort or contract, the claim is derived from contract and seems waivable. As the state has labeled the law, it does not appear to arise independently of the contract, but it is merely a derivative claim, which must be dismissed as preempted or rejected under section 301 for Harry's failure to exhaust the grievance procedure. If the covenant were derived from the collective agreement, the claim should surely be preempted or treated as a section 301 claim. If the source of the claim is in Harry's individual employment contract, it could only be because the individual contract conflicts with the labor contract. Yet, it is hornbook labor law that a conflicting individual contract must give way to the labor contract.[212] Thus, either the implied covenant is traceable to the labor agreement and preemption lies, or it cannot exist; in any event, since the covenant appears negotiable, Harry is preempted or has no cause of action.

Although this analysis seems formidable, it mischaracterizes both the nature and origin of the right under state law. The implied covenant of good faith and fair dealing, just as a state law requiring minimum wages or health benefits, provides a minimum substantive floor for indi-

209. *Metropolitan Life*, 471 U.S. at 749 n.27; *see also* Brown v. Hotel Employees, Local 54, 468 U.S. 491, 504-07 (1984).

210. 41 U.S. (16 Pet.) 1 (1842); *see* Hughes v. Superior Court, 339 U.S. 460, 467 (1956) (whether state policy is found in common law or legislation is immaterial to the weight of the state's interest, because states are free to distribute legislative power as they see fit); *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 366-67 n.42 (1978) (separate opinion of Brennan, J.) ("the manner in which a State chooses to delegate governmental functions is for it to decide").

211. *See* cases cited *supra* at note 19.

212. J.I. Case v. NLRB, 321 U.S. 332 (1944). *Contra supra* note 206.

vidual employees. In this case, state law mandates that individual workers cannot be terminated in bad faith. The right to be free of bad faith discharges is not contingent on negotiation. Nor is there any indication that the state court would permit an individual employee to trade this implied covenant for another benefit. Rather, the state court has deemed the right nonwaivable as a matter of law. Consequently, it is empty formalism simply to look at the state's contract-like label—the implied covenant of good faith and fair dealing—and declare the right to be rooted in contract and thus preempted. What counts is not the label, but the attributes underlying the denomination, in this case a nonnegotiable right given to individual employees to be free of bad faith discharges implied from state law.[213] Irrespective of whether the right of action is *styled* in tort or contract, implied-in-law or implied-in-fact, if the right to job security is nonwaivable as a matter of state law and emerges apart from the collective agreement, an action based on that right should not be preempted or treated as a section 301 claim. Properly understood, Harry's cause of action for bad faith discharge, alleging breach of the implied covenant of good faith and fair dealing, is an independent, nonwaivable right that devolves on individual employees, and its assertion should be permitted.

Even were Massachusetts to promulgate a cause of action proscribing all terminations without just cause, there should be no preemption. Although any cause of action arising under this law would overlap with the labor agreement, under principle (i) of *Lueck* and *Metropolitan Life* (cognizability under the agreement is immaterial) that should make no difference. Plainly, this law would be written without consideration of the existence of the labor agreement, and would not in any way be predicated on or rooted in the contract. Nor would the state right be subject to negotiation or waiver. It bans all discharges lacking just cause without consideration of individual contract or collective agreement. Therefore, the state right of action survives under principles (ii) (the operative test is whether the cause of action would exist but for the agreement) and (iii) (all derivative claims must be preempted).

Some readers no doubt will strongly object to this argument, thinking that the arbitral mechanism, central to the administration of the collective agreement is now destroyed, severely undermined as a vehicle for dispute resolution.[214] But I argue below that allowing unionized workers

213. *See supra* text at note 178.

214. *See* Wheeler & Browne (Revised), *supra* note 88, at 41. Wheeler and Browne also assert that "[a] just cause requirement may be the kind of case that would fall within an exception to *Metropolitan Life Insurance*," because "the addition of too many substantive terms favoring one of the parties may . . . creat[e] an inequality of bargaining power." In a legal regime in which at-will employees are provided a cause of action for wrongful discharge, permitting unionized workers to have judicial access to vindicate nonwaivable, nonderivative rights, once the union has refused to

to bring a cause of action under a state law providing that no employees may be fired without just cause, or forbidding bad faith discharges, is fully compatible with the premises of the NLRA. Conversely, I will argue that to confine unionized workers exclusively to the remedies set out in their collective agreements, while providing at-will employees judicial access to contest wrongful terminations, would be inconsonant with the animating spirit that informs the Act.

In sum, *Lueck* and *Metropolitan Life* stand for the proposition that state rights of action alleging retaliatory discharge, discharge in violation of public policy, and breach of an implied-in-law covenant of good faith and fair dealing should not be preempted if the claims are founded in rights that are both independent of the collective agreement and not subject to waiver or negotiation. Thus, only a wrongful discharge claim *functionally* premised on a violation of contract, whether individual or collective, express or implied, should be dismissed. In Part IV several wrongful discharge cases decided by the lower courts in the aftermath of *Lueck* are analyzed in the light of these principles.

IV
WRONGFUL DISCHARGE ACTIONS AFTER *LUECK* AND *METROPOLITAN LIFE*: THE LOWER COURTS AND FEDERAL LABOR POLICY

Prior to *Lueck* and *Metropolitan Life*, most lower courts held that unionized employees were permitted to assert state wrongful discharge actions, at least where they could point to a specific statute implying or, more generally, "creating" or "establishing" the cause of action. Moreover, the courts often relied on the *Barrentine-Gardner-Denver* independent-individually based rights inquiry, in addition to balancing federal and state interests, to determine whether the wrongful discharge claim should be dismissed. By contrast, where the right of action was not grounded in statute, most lower courts refused to permit unionized employees to bring state wrongful discharge actions.

Subsequent to *Lueck* and *Metropolitan Life*, one would have thought that cases like *Peabody-Galion* and *Garibaldi* would continue to represent the majority view of the lower courts, while cases like *Moore* would be subject to much closer scrutiny.[215] Yet the outcome has been the opposite. As one court mistakenly put it:

> Until recently, the weight of authority may have appeared to support plaintiff's position that his action for retaliatory discharge . . . was not

press their case to arbitration, will simply assure that the collective bargaining power of unions is not eroded by the state regime. Access to state courts will merely restore the balance of bargaining power to the equilibrium extant before the erosion of the at-will doctrine. In particular, see *infra* text at pp. 656-58.

215. *See supra* text at notes 92-118.

> preempted by federal labor law. Both the Ninth and Tenth Circuit Courts of Appeals had held that suits alleging wrongful termination in violation of state public policy are not preempted or precluded by the grievance and arbitration clauses of collective bargaining agreements. *See, e.g., Peabody Galion v. Dollar* [] . . .; *Garibaldi v. Lucky Food Stores, Inc.* [] . . . . However, [because of the decision] last month in *Allis-Chalmers Corp. v. Lueck* [the weight of authority has changed].[216]

Though several representative decisions of the lower federal courts follow this reading of *Lueck*, to foreclose unionized workers from asserting state wrongful discharge actions is incompatible with congressional intent and federal labor law policy.

A. Wrongful Discharge in the Lower Federal Courts: The Cognizability Test

A majority of the federal district courts and courts of appeals[217] have interpreted *Lueck* to bar unionized employee-plaintiffs from asserting state wrongful discharge claims. One searches in vain to find a single citation to *Metropolitan Life* in any of the opinions.[218] Virtually all the lower courts, purporting to rely on *Lueck*, have employed a test of cognizability under the grievance and arbitration procedure—which is not in accord with principles (i) and (ii) derived directly from *Lueck* and *Metropolitan Life*.[219]

The Ninth Circuit in *Harper v. San Diego Transit Corp.*[220] held that section 301 preempted a unionized worker's complaint asserting breach of contract, breach of the duty of fair representation, wrongful termination in violation of company policy and wrongful termination in violation of the implied covenant of good faith and fair dealing. The first three claims were comfortably characterized as lying within the scope of section 301, and thus were foreclosed by the *DelCostello* statute of limita-

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216. Johnson v. Hussman Corp., 610 F. Supp. 757, 758 (E.D. Mo. 1985), *aff'd*, 805 F.2d 795 (8th Cir. 1986).

217. In nearly all of the 33 wrongful discharge actions found by this author, in a Lexis search conducted in 1986, to have been filed by unionized employees after *Lueck*, the courts interpreted *Lueck* to hold that cognizability under the agreement was dispositive. *Contra* Muenchow v. Parker Pen Co., 615 F. Supp. 1405, 1415-16 (W.D. Wis. 1985) (expressly rejecting the test of cognizability under the agreement); *see also* Orsini v. Echlin, Inc., 637 F. Supp. 38, 41-42 (N.D. Ill. 1986); Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308, 313-14 (1986), *cert. denied*, 107 S. Ct. 3248 (1987).

218. *See supra* note 191.

219. *See supra* note 205 and accompanying text. *Contra* Kinyon & Rohlik, *supra* note 88, at 21-22 ("The question must be *when* or *as* to *which issue* does a state have the right to regulate conduct by mandatory rules of state law. . . . The answer to the question must be found in either balancing state and federal interests, or in the determination of whether the court suit and arbitration would deal with essentially the same issues. The latter criterion may have been suggested in [*Lueck*].") (emphasis in the original), 63; *see* Wheeler & Browne (Revised), *supra* note 88, at 2-3, 25-28.

220. 764 F.2d 663 (9th Cir. 1985).

tions rule.[221]

The reasoning that the court used to preempt the implied covenant claim and to distinguish *Garibaldi*[222] is much more troubling. The Ninth Circuit's effort to distinguish *Garibaldi* was based on an inaccurate portrayal of the case. The court reasoned that Harper's claim fell within section 301, since "[t]here is no indication that the 'good cause' provision of his contract provided any *less* protection than California wrongful termination law. Thus, it is unnecessary to address whether state law confers nonnegotiable rights on employees."[223] The court arrived at the technically correct conclusion, as Harper made the tactical pleading error of alleging that the implied covenant was found in his collective agreement.[224] Therefore, based on a narrow reading of the formal pleadings, any action necessarily derives from the agreement. But the court's method of analysis inverted the methodology prescribed in *Lueck*: the focus must be whether the cause of action springs independently of the contract or is rooted in the agreement.

Moreover, the court's assertion—since the collective agreement provided protection equal to that provided by the state-created right, ipso facto there must be preemption—represents a misapplication of both *Lueck* and *Metropolitan Life*. Whether the transaction giving rise to the cause of action is violative of an independent, nonwaivable right under state law is wholly unrelated to whether the grievance and arbitration machinery contained in the agreement *might* provide equally adequate protection.[225]

Finally, the court found that *Garibaldi* was in accord with *Lueck* and still good law. But if one adopts the *Harper* court's reading of *Lueck, Garibaldi* is no longer viable. While Garibaldi's claim may have "transcended the employment relationship," the claim was cognizable under the agreement. In *Garibaldi*, not only was the plaintiff afforded the protection of a "just cause" provision, but his case was in fact arbitrated. The arbitrator expressly reached the allegation that Garibaldi was terminated for refusing to deliver adulterated milk and for calling the health authorities. The arbitrator simply found the allegation unfounded. Under the terms of the just clause provision of the labor contract, the arbiter was empowered to vindicate Garibaldi's discharge, which allegedly violated state public policy. Thus, there was no evidence "that the 'good cause' provision of his contract provided any less protec-

221. *Id.* at 669; *see supra* note 105.

222. *See supra* text accompanying notes 102-11.

223. 764 F.2d at 668 (emphasis added).

224. *Id.* at 669.

225. Indeed the court quipped that had Harper not asserted that the violation of the implied covenant of good faith and fair dealing constituted a breach of the labor agreement, the result might have been different. *Id.*

tion than California wrongful termination law."[226] Therefore, under the *Harper* court's post-*Lueck* test, Garibaldi's claim would have to be dismissed as well.

Ironically, as a practical matter, Harper's state claim was afforded less protection by the agreement than was Garibaldi's state-created right. In contrast to the employee-plaintiff in *Garibaldi*, Harper never received a hearing on the merits of his state-law claim before a neutral decisionmaker, because the union refused to press his grievance.

The Seventh Circuit used the same cognizability test and reached the same conclusion in *Vantine v. Elkhart Brass Manufacturing Co.*[227] The plaintiff was placed on layoff status after the termination of a one-year sick leave, pursuant to the agreement. The union filed a grievance, alleging that a layoff incidental to an occupational injury violated the seniority clause of the agreement. The union submitted the dispute to arbitration. While awaiting the award, however, the union entered into a deal with the employer. The sidebar agreement, reached without Vantine's knowledge or consent, provided that if the union lost the seniority arbitration, it would acquiesce in a decision by the employer to discharge Vantine.

After the union lost the seniority arbitration and the employer fired Vantine, the union refused to grieve his discharge. Vantine filed suit in state court, alleging *inter alia* that he was discharged in retaliation for filing a workers' compensation claim.[228] Relying on *Lueck*, the court held that the suit was within the scope of section 301, "because an allegation of discharge in retaliation for filing a workmen's compensation claim is an allegation of a breach of the collective bargaining agreement."[229] The court alternatively held that, as a matter of Indiana tort law, a collective agreement provided adequate protection against retaliatory discharge.[230]

In a case before the Fifth Circuit, an employer suspended two unionized employees on suspicion of using drugs.[231] In order to retain their

226. *See* Petitioner's Brief in Support of Petition for the Writ of Certiorari in *Garibaldi* at Appendix A 3-4. Appendix A sets forth the award and opinion of the Arbitrator in full. The union argued at the arbitral proceeding that the cause of Garibaldi's discharge was his effort to prevent "the company attempt[] to foist bad milk on an unsuspecting public," and that the other reasons proffered by the employer for the discharge were insufficient. *Id.* Arbitrator Darrow explicitly rejected the union's contention, and instead found that the cause of Garibaldi's discharge was his repeated failure to obey supervisory orders—for which he was warned some five times prior to the ultimate event leading to the litigation. *Id.* at 5-9.

227. 762 F.2d 511 (7th Cir. 1985).

228. *Id.* at 514-16.

229. *Id.* at 517.

230. *Id.* As a practical matter, this observation is accurate only to the extent that a union chooses to abitrate a unionized worker's grievance. *See supra* notes 51-61 and accompanying text; *infra* text accompanying notes 256-63; *supra* note 214.

231. Strachan v. Union Oil Co., 768 F.2d 703, 704-05 (5th Cir. 1985).

jobs, they were required to submit to blood and urine tests and to allow searches of their cars and lockers. After the test results were negative, the employees filed suit alleging the tort of false imprisonment. The court colorfully, if incorrectly, held that

> [t]his routine procedure occurs thousands of times every year under collective bargaining agreements throughout the United States. No matter in what glamorous garb it is dressed, the basic thrust of the appellants' claim is that a suspension and investigation for possible disciplinary action itself constitutes a tort under state law.
>
> The law is completely clear that employees may not resort to state tort or contract claims in substitution for their rights under the grievance procedure.[232]

Finally, one district court case, *Clark v. Momence Packing Co.*,[233] warrants special attention. Several unionized employees, fired subsequent to filing workers' compensation claims, sought to bring state tort actions for retaliatory discharge, apparently without first grieving.[234] The court read *Lueck* as requiring preemption when the dispute was cognizable under the agreement.

> Any state court consideration of a retaliatory discharge claim involves an inquiry into the cause for the discharge. A successful plaintiff must prove that his or her discharge was due solely to the filing of a worker's compensation claim. Such an investigation is "inextricably intertwined with consideration of the terms of the [agreement];" in that the . . . collective bargaining agreement requires "good and sufficient cause" for a proper dismissal.[235]

The court further rejected plaintiffs' argument that the right to bring suit for retaliatory discharge was a nonwaivable right, arising independently of the agreement. The court reasoned that it was not the cause of action that was an independent, nonwaivable right. Rather, it was the right to file workers' compensation claims, free of retaliatory discharge, which was an independent right that survived the preemptive effect of the agreement.

> [The plaintiffs] misstate the right which avoids preemption; it is the right to file a worker's compensation claim without retaliation. . . . However, the right to file worker's compensation claims is not the equivalent of a right to file a state tort claim for retaliatory discharge. . . . The right to file a worker's compensation claim is not altered or compromised by the federal preemption of the state tort action. A collective bargaining agreement cannot allow an employer to violate the Illinois statute prohibiting retaliation. . . . Such a contract would be unenforceable.[236]

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232. *Id.* at 704.

233. 637 F. Supp. 16 (C.D. Ill. 1985).

234. *Id.* at 17.

235. *Id.* at 18 (quoting *Lueck*, 471 U.S. at 213 (first quotation)).

236. *Id.* at 19.

Yet the court's tautology did not explain how plaintiffs should go about enforcing the right, since plaintiffs' only remedial avenue was now closed, detoured first by the collective agreement, and now routed into a *cul de sac* by the court's reasoning. The court failed to explain how a unionized employee for whom the union decides in good faith not to arbitrate, but who nevertheless was fired in violation of a nonwaivable state right that arises independently of the collective agreement, is now supposed to vindicate her independent state law right.[237]

Let us return to Harry, Sally, Giant and the UHW. Sally has already won her case. Harry's claims plainly are cognizable under the just cause and grievance and arbitration provisions of the agreement. If the reasoning that a majority of the lower courts have applied in the wake of *Lueck* were applied to Harry's case, Giant's summary judgment motion will prevail. This result, as we have already seen, is inconsistent with *Lueck* and *Metropolitan Life*. In addition, the evisceration of Harry's nonnegotiable, individually based state law rights that spring independently of the agreement does violence to the will of Congress and to federal labor law policy.

B. State Wrongful Discharge Actions: The Intent of Congress and Federal Labor Policy

When it enacted the NLRA, Congress could not possibly have envisioned state wrongful discharge actions. In 1935, the at-will doctrine was near its zenith; it apparently had been given constitutional protection under the guise of freedom of contract only twenty-five years earlier.[238] Indeed, during the Wagner Act debates, there was great concern expressed respecting the constitutionality of the Act itself.[239] Although, by 1937 congressional power to regulate labor relations under the Commerce Clause was beyond question,[240] there was no hint that at-will employees would be afforded state-created remedies against wrongful discharge. In fact, it was always assumed that one of the seminal differences between at-will employees and unionized workers was the ability of employees covered by collective agreements to be secure against unjust

237. *See supra* notes 60-61 and accompanying text.

238. Adair v. United States, 208 U.S. 161 (1908). In *Adair* the Court struck down as unconstitutional a provision of the Erdman Act making it unlawful to discharge a railway employee because of his union membership. The Court reasoned that "the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé." *Id.* at 174-75. *See also* Coppage v. Kansas, 236 U.S. 1 (1915).

239. *See* I. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 106-07, 113-14, 120-24 (1950).

240. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

termination.[241]

It follows that, when it enacted the Wagner and Taft-Hartley Acts, Congress expressed no views directly regarding the fit between state wrongful discharge actions and the federal regulatory scheme. Moreover, although the states were to retain a role in the regulation of labor conditions,[242] congressional silence concerning the extent of the states' role is deafening.[243] Consequently, in deriving congressional intent regarding state wrongful discharge actions, one must necessarily ascertain and balance the broad policy goals and aims that Congress had in mind, rather than attempt to discover a specific congressional intent regarding this particular issue.[244] Once one has identified the aims and premises of the NLRA, one must determine the extent to which it would promote or frustrate these congressional policies if the courts were to permit unionized employees to assert state-created wrongful discharge actions predicated on nonwaivable rights and not derived from the collective agreement.

In passing the Wagner Act, Congress declared that it was "the policy of the United States . . . to encourag[e] the practice and procedure of collective bargaining and . . . self-organization."[245] Congressional desire to encourage collective bargaining and union organization was primarily instrumental. The Act was passed in a context of tremendous social and economic upheaval tearing at the fabric of the nation. In a society racked by depression, violent and even fatal strikes in which workers fought for union recognition against obdurate employers had reached nearly epidemic proportions.[246] Thus, the framers of the Wagner Act believed "that protection by law of the right of employees to organize and bargain collectively . . . remove[s] . . . sources of industrial strife . . . by encouraging . . . the friendly adjustment of industrial disputes . . . and by restoring equality of bargaining power between employers and em-

241. *See, e.g.*, Weiler, *supra* note 1, at 1823-24; Weiler, *supra* note 40 at 376 n.84; Note, *supra* note 2, at 1816, 1832; Summers, *Time for a Statute, supra* note 2, at 482-83.

242. *See* text *supra* at notes 175-76.

243. *Id.; see* H. MILLIS & E. BROWN, *supra* note 1, at 593-661; Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037, 1038 (1973); Cox, *Federalism, supra* note 138, at 1345-48; Hays, *supra* note 156, at 964-74. There are only two references to the continuing role of the states in the legislative histories of Wagner and Taft-Hartley. One suggests a broad role for the states. 93 CONG. REC. 6383-84 (June 4, 1947) (Representative Hartley, responding in colloquy while reporting on bill that emerged from Conference Committee), *reprinted in* 1 HISTORY OF THE LMRA, *supra* note 28, at 883. The other only makes an opaque reference to the states' role. 79 CONG. REC. 7674 (May 16, 1935) (Remarks of Senator Walsh) (Debates on S. 1958), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE WAGNER ACT OF 1935, 2396 (1949) [hereinafter HISTORY OF THE WAGNER ACT].

244. Cox, *Federalism, supra* note 138, at 1308, 1347-48; Hays, *supra* note 156, at 974.

245. 29 U.S.C. § 151 (1982); *see* Weyand, *supra* note 14, at 599 & n.150.

246. For a riveting account of the period, see I. BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-41, at 217-317 (1969).

ployees."[247] Congress believed that the enhancement of collective strength would alleviate the "depress[ed] . . . purchasing power of wage earners," thus preventing or at least tempering future downturns in the business cycle.[248]

In order to further the policy goals of the NLRA, Congress did not mandate that workers must receive substantive minima. Rather, as the Court recognized in *Metropolitan Life*,[249] Congress erected a *process* aimed at facilitating organizing and collective bargaining.[250]

It is unmistakable, however, that Congress assumed that workers would benefit substantively by embracing the collective process. The underlying premise of the NLRA was that collective bargaining would improve the wages and working conditions of employees by bolstering their bargaining power.[251] Consequently, interpreting the Act so as to relegate

247. 29 U.S.C. § 151; *see* S. REP. NO. 573, 74th Cong., 1st Sess. 1 (1935) ("The first objective of the bill is to promote labor peace."), *reprinted in* 2 HISTORY OF THE WAGNER ACT, *supra* note 243, at 2300; 79 CONG. REC. 7565 (May 15, 1935) (Senator Wagner) (debates on S. 1958), *reprinted in* 2 HISTORY OF THE WAGNER ACT, *supra* note 243, at 2321; H.R. REP. NO. 1147, 74th Cong., 1st Sess. (1935), *reprinted in* 2 HISTORY OF THE WAGNER ACT, *supra* note 243, at 2054-55; H. MILLIS & E. BROWN, *supra* note 1, at 27, 28, 102; Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407 (1958) ("[t]he most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards"); *see also* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 506-07 (1960) (Frankfurter, J.) (separate opinion) (primary aim of legislation was to achieve equality of bargaining power between capital and labor). Critical legal scholars argue that the "pluralist" vision of labor law has overstated congressional concern for labor peace, and understated congressional concern for ameliorating inequality of bargaining power. For the most powerful of these accounts, see Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

248. 29 U.S.C. § 151; *see* I. BERNSTEIN, *supra* note 239, at 90; I. BERNSTEIN, *supra* note 246, at 324-25; H. MILLIS & E. BROWN, *supra* note 1, at 20.

249. *See supra* text at notes 198-200.

250. Congressional concern with process, as opposed to the substantive outcome of the process, is exemplified by the oft-quoted remarks of Senator Walsh.

> Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of work, or to effect or govern any working condition . . . .
>
> . . . .
>
> . . . The bill does provide the means and manner in which employees may . . . discuss grievances and permit the board to ascertain and certify the . . . organization favored by a majority. . . .
>
> . . . The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary . . . .

79 CONG. REC. 7659-60 (May 16, 1935) (debates on S. 1958), *reprinted in* 2 HISTORY OF THE WAGNER ACT, *supra* note 243, at 2372-73. *See* H.K. Porter v. NLRB, 397 U.S. 99, 108 (1970) ("the fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone . . . ."); Cox, *supra* note 247, at 1409; *supra* note 199. *But cf.* Miller, *The Enigma of Section 8(5) of the Wagner Act*, 18 INDUS. & LAB. REL. REV. 166 (1965).

251. As Leon Keyserling, who was Senator Wagner's assistant from 1933-1937 and who participated in the drafting of the Act, put it:

unionized employees to second-class status vis-a-vis their nonunion counterparts by affording them less protection against wrongful discharge would defeat a primary purpose of the Act.

Nonetheless, one can argue that the assertion of state rights of action[252] unduly interferes with the congressionally approved process of arbitration and collective bargaining and thus must be preempted. But before one turns to the traditional arguments advanced for preemption of rights of action asserted by *unionized* employees, there is a related and more powerful, if not yet fully articulated, argument that must be addressed: namely, that even state wrongful discharge actions brought by *at-will* employees must be preempted.

One could posit with some force that rights of action accorded to at-will employees against wrongful discharge diminish the value of a substantial benefit that accrues to unionized workers as a result of collective bargaining. If a vital distinction between at-will and unionized employees is protection of the latter against arbitrary termination,[253] arguably all state rights of action against wrongful discharge critically reduce the marginal value of collective bargaining and joining a union.[254] Consequently, one could conclude that the state scheme affording rights of action to at-will employees—even if it allowed assertion by unionized workers—must be preempted as unduly frustrating the right to self-organization contemplated by section 7 of the Act.

> . . . Senator Wagner's central argument for his bill was always on general economic and social grounds. He never valued the measure primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for . . . economic and related social progress. . . .
>
> It was for this reason that the Senator insisted that the declaration of policy of the bill . . . should stress not only the damaging effects of work stoppages . . . , but also the damaging effects of inequality of bargaining power and consequent deficiencies in consumer purchasing power. . . .

Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 218 (1960); *see* I. BERNSTEIN, *supra* note 239, at 90, 101; H. MILLIS & E. BROWN, *supra* note 1, at 20; 1 C. MORRIS, *supra* note 86, at 27; Cox, *supra* note 247, at 1407-09; Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFFALO L. REV. 9, 11-12 (1982); Weiler, *supra* note 40 at 384; *see also* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 735 (1981) (quoting NLRB v. Allis-Chalmers, 388 U.S. 175, 180 (1966)) (NLRA is predicated on the notion that, by combining their economic strength, workers can achieve the most effective means of bargaining, resulting in improvements in wages, hours and working conditions and in industrial peace); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

252. To avoid repeating that the rights of action that a unionized worker seeks to bring in order to vindicate a wrongful termination are of the independent and nonwaivable variety, they shall hereafter be referred to as "rights of action" or "causes of action," unless otherwise indicated.

253. *See* sources cited *supra* note 241.

254. Catler, *supra* note 18, at 494-509. The thesis of Catler's thoughtful and thought-provoking article is that exceptions to the at-will doctrine will make it more difficult to organize by providing workers with a cost-free alternative to unionization, and thus the doctrine should not be weakened. *Cf.* M. GLENDON, *supra* note 2, at 204 ("one must wonder how much the new property and 'individual' labor law strengthens the state at the expense of unionization and the collective bargaining process").

On a formal level this argument is not difficult to refute; section 7 only promises the "right" to organization. State causes of action against wrongful discharge do not impede the "right" to organize. But the formal argument does not account for the practical reality: arguably, state-created rights of action to some degree vitiate workers' *ability* to organize.[255]

In the short run, no doubt, this thesis is correct. Rights of action against wrongful discharge indeed make the task of "organizing the unorganized," as unions have tagged their task, somewhat more arduous.[256] But that does not lead any commentator, including this one, to assert that wrongful discharge actions of at-will employees should be preempted. Although the foundation of federal labor policy is to "encourage collective bargaining and self-organization," Congress simultaneously intended to ameliorate "inequality of bargaining power" and to improve generally the lot of working people.[257] Moreover, even if Congress viewed labor organizations as the *primary* medium through which workers could seek self-betterment,[258] there is no evidence that it saw unionization as the *exclusive* vehicle for the substantive improvement of wages, benefits and working conditions. On the contrary, Congress passed the Social Security Act shortly after completing its work on the Wagner Act,[259] and, a few years later, enacted the Fair Labor Standards

255. Catler, *supra* note 18, at 494-508.

256. In organizing campaigns, when union organizers attempt to offer protection against unjust discharges as one of the fruits of unionization, workers often respond by saying, "Why, if they fire me, I'll go to the Labor Board," or "I'll go to the EEOC," or even "I'll go to OSHA." At this point, their reliance on the government for protection is much more limited than they preconceive. Thus, the organizer usually can explain the narrow scope of governmental protection against unjust discharge, in contrast to the protection obtained through just cause provisions in labor contracts enforced by binding arbitration.

Obviously, if there were state rights of action offering protection against wrongful discharge commensurate in scope to that provided in collective bargaining, the task of organizing would be made more difficult, although far from impossible. It is my experience that, at bottom, what animates most *successful* organizing campaigns, in which workers retain the stamina to withstand intense employer pressure and intimidation, is a quiet rage at not having a *voice* in wages and working conditions. State protection against wrongful discharge, albeit helpful, is far from a complete answer to industrial democracy and workplace dignity that only collective bargaining can bring and thus will not assuage the sense of insult felt by workers ready for self-organization. *See supra* note 18. Additionally, while full development of this notion will have to await another day, innovative organizing techniques by unions can exploit such state-offered protection against wrongful discharge by visibly demonstrating the benefits of collective action. For example, a few creative organizers have shown workers how to make maximum use of employer-created grievance and arbitration schemes, thus demonstrating the merits of collective action. Similarly, the union could bring state causes of action on behalf of wrongfully discharged nonunionized employees and use the suits as an organizing tool. Finally, leaving aside the reductionist argument that state safety, health and wage laws also deter union organizing, it bears remembering that arbitration provides protection against far more than discharge—it is the remedial mechanism for the entire "code of self-government."

257. *See supra* notes 248, 251 and accompanying text.

258. *See* I. BERNSTEIN, *supra* note 239, at 100-01.

259. The Social Security Act was signed into law on August 14, 1935, just a few months follow-

Act.[260] Both statutes preceded completion of the Taft-Hartley Amendments.

In addition, Congress passed the Act conscious of the long tradition of state substantive labor regulations. It is thus likely, as the Court recognized in *Metropolitan Life*, that Congress meant the operation of the federal scheme to be interstitial, leaving the states free to promulgate substantive regulatory schemes of general applicability.[261]

The collective bargaining process has failed to live up to the expectations of Congress when it passed the NLRA. Only a small fraction of the workforce is afforded some measure of job protection through collective bargaining.[262] Unions thus far have failed to serve as a successful exclusive counterweight to the expansive power of management. It therefore seems inconceivable that, if Congress could have envisioned an industrial order in which a vast majority of employees must look to the states for job security, or go without any protection at all, it would have ousted state rights of action against wrongful discharge. If it had been able to foresee that the labor movement would fail to bring collective organization and collective protection to the vast majority of workers, Congress certainly would have allowed state-mandated job security laws, just as it intended to permit state mandatory wage, health and benefit laws to coexist with the collective rights provided in the NLRA. Thus, these actions of "at-will" employees should not be preempted, provided that the state scheme provides unionized employees with rights and remedies that are functionally coextensive with the rights and remedies of their nonunion counterparts.[263]

Let us return to Harry's plight. If the regime created by the lower

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ing the passage of the Wagner Act. 49 Stat. 620 (1935) (codified in 42 U.S.C. §§ 301-1391(f) (1982)).

260. The FLSA was passed in 1938. 52 Stat. 1060 (1938) (codified in 29 U.S.C. §§ 201-219 (1982)). Congress has since enacted Title VII, ERISA, and the Equal Pay Act, which also provide substantive benefits to individual workers apart from the collective process.

261. *See supra* text at note 204.

262. *See supra* note 1 and accompanying text.

263. Thus, a state law that on its face accords nonwaivable rights of action only to at-will employees would have to be preempted under the formulation set out here, because the federal scheme does not allow states to discriminate between union and nonunion workers in a way that interferes with workers' § 7 rights. 29 U.S.C. § 157 (1982); *see supra* text at notes 202-03. Of the four state high courts to address expressly the issue, three have decided that exceptions to the at-will rule should be applied to unionized employees. *Compare* Fleming v. Pima County, 141 Ariz. 149, 685 P.2d 1301, 1305-06 (1984) (en banc); Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308, 311-12 (1986), *cert. denied*, 107 S. Ct. 3248 (1987) *and* Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280, 1283-85 (1984), *cert. denied*, 472 U.S. 1032 (1985) *with* Cox v. United Technologies, Essex Group, 240 Kan. 95, 727 P.2d 456 (1986). Also, a bill once considered by the California legislature would have codified wrongful discharge actions with an explicit provision prohibiting unionized employees from bringing actions under the proposed statute. Because it attempted to extend a right of action only to nonunionized employees, thereby discriminating against unionized workers, the bill should have been preempted. Assembly Bill 3017 (1984), § 2883(c).

courts were to prevail, Harry unlike Sally would be unable to vindicate his discharge in any forum. Although Sally properly was able to gain redress through the courts, Harry would be forced to bear the penalty of "industrial capital punishment"[264] without remedy. In effect, Harry would be penalized as a result of his union status. The best solution to Harry's current dilemma is to allow him to seek judicial vindication since the union has refused to press his grievance to arbitration.[265]

But let us alternatively suppose that the union expressed willingness to arbitrate Harry's discharge, and Harry agreed to have his dispute resolved in the arbitral forum. Let us also assume for the moment that Giant was somehow able to demonstrate to the arbiter's satisfaction that Harry was fired for just cause. Perhaps Giant convinced the arbitrator that the importance of preserving the "obey, then grieve" rule outweighed Harry's previously spotless work record. Perhaps the arbiter declined to hear any argument relating to the Massachusetts anti-polygraph statute. The question then arises whether Harry should be allowed to attack the unfavorable award in a de novo judicial proceeding, as were the plaintiffs in *Gardner-Denver* and *Barrentine*.

The better answer here is no. It is true that the proceedings obtained in an arbitral forum do not fully comport with the norms obtained in judicial proceedings.[266] But when unionized employees have recourse to an arbitration proceeding to contest the propriety of their discharges, they are no longer disadvantaged relative to at-will employees provided with judicial protection against wrongful termination. In Harry's arbitration case, a finding that he was terminated for cause would be far from

264. Arbitrators often refer to discharge as "industrial capital punishment" because of the severe social and economic consequences, often far beyond the immediate job loss, that not infrequently accompany the termination of an individual worker. *See* F. ELKOURI & E. ELKOURI, *supra* note 17, at 661 & nn.60 & 62; Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 CINCINNATI L. REV. 55, 57-58 (1972).

265. Some commentators have suggested that employees should always have access to arbitration to contest discharges regardless of the context. Professor Summers asserts that, if the union refuses to press the case, the employee should be allowed to arbitrate it at her own expense. Summers, *supra* note 40, at 274; *see* VanderVelde, *supra* note 40, at 1146-47 (employee should be permitted to arbitrate her grievance at her own expense when the union bases its decision to refuse to arbitrate solely on financial considerations). Other commentators have urged that the union should be required to arbitrate all meritorious discharge grievances. Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631, 656-57 (1959); Tobias, *supra* note 264, at 89. Plainly either of these formulations would suffice to ameliorate Harry's dilemma.

An insurmountable difficulty accompanies these suggestions, however. Irrespective of who bears the cost, any suggestion that the employee has an independent right of access to the grievance procedure runs counter to the holding of *Vaca*. Thus, a mandatory access rule would require amendment of the exclusivity provision of the Act. § 9(a), 28 U.S.C. § 159(a) (1982); *see supra* notes 51-56 and accompanying text. Of course, there is nothing to foreclose an employer and union from agreeing to a provision vesting employees with the right of access in discharge cases—a solution that this author would endorse, and that would render this Article moot.

266. *See supra* note 78 and accompanying text.

the norm, and would be viewed by most as an aberrant decision. But even if the unfavorable award in fact were rendered, the final result would not prove fatal to Harry.

Most discharged unionized workers who obtain an arbitral forum are reinstated, in large part, because arbitrators are loathe to inflict the penalty of industrial capital punishment.[267] There are relatively few allegations of unfair representation involving unions' presentation of arbitration cases.[268] If complex questions of law abound in Title VII, section 1983 and FLSA controversies, wrongful termination cases generate few issues of law.[269] Rather, wrongful discharge disputes tend to be extremely fact bound.[270] *Gardner-Denver* and its progeny are thus distinguishable on the grounds of institutional competence. Title VII and FLSA litigation often present thorny questions of statutory construction, whereas Harry's case involves the simpler matter of wrongful discharge.

Additionally, the normal standard of judicial review is sufficiently broad in scope to vacate any awards that contravene state law and public

267. A recent survey shows that arbitrators order reinstatement in 66% of the discharge cases they hear. M. GLENDON, *supra* note 2, at 155. Because discharge is viewed as industrial capital punishment, employers bear the difficult burden of proving that the grievant engaged in wrongdoing sufficiently egregious to warrant the penalty. F. ELKOURI & E. ELKOURI, *supra* note 17, at 661. In contrast, unions bear the burden of persuasion in disputes not involving discipline and discharge, and the union success rate in all arbitrations is only about 42%. *Id.* at 126 n.3; *see* Tobias, *supra* note 264, at 56-57 & n.5, 58 & n.6.

268. *See* Goldberg, *supra* note 61, at 129 (70.7% of duty of fair representation cases involved grievance handling prior to submission to arbitration, only 19.7% alleged unfair union conduct during or subsequent to the arbitration); VanderVelde, *supra* note 40, at 1082 n.8 (most duty of fair representation suits involve union abandonment of the grievance prior to arbitration).

269. There is a long-standing debate among arbitrators regarding the institutional capacity and propriety of looking to external law as a guide to contract interpretation. *Compare* Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 CHI. L. REV. 545 (1967) *and* Howlett, *The Arbitrator, the NLRB and the Courts*, 20 PROC. ANN. MEETING NAT'L ACAD. ARB. 67 (1967) *with* Sovern, *When Should Arbitrators Follow Federal Law?*, 23 PROC. ANN. MEETING NAT'L ACAD. ARB. 29 (1970). *See generally* F. ELKOURI & E. ELKOURI, *supra* note 17, at 370-74. The debate within the Academy was fueled with the advent of *Gardner-Denver. See, e.g.*, Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65 (1977); Feller, *supra* note 80, at 97; St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137 (1977). Notwithstanding the debate among arbiters, the Court has made plain its view that, because of the complex legal questions often arising in Title VII, FLSA and § 1983 matters, these cases are beyond the institutional competence of the arbitral profession. *See supra* note 75 and accompanying text; text at notes 76-78, 84; Morris, *NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility*, 7 INDUS. REL. L.J. 290, 292 (1985).

270. *See, e.g.*, Cox, *Reflections, supra* note 40, at 1493; VanderVelde, *supra* note 40, at 1104 n.75. On occasion, some discharge disputes turn on questions of "law." For example, the submission to the arbiter might involve whether, on the agreed upon facts, the employer's action was taken for just cause. I believe that the vast majority of discharge disputes involve mainly factual questions, although I have been unable to locate any empirical data to support my observation. In any event, the general meaning of "just cause" is hardly controversial. *See infra* notes 286-90 and accompanying text.

policy.[271] Harry's adverse and aberrant hypothetical award, therefore, could be vacated in a proceeding brought to set it aside in federal district court. Thus, this modified case presents few difficulties for the settled labor law order. The arbitration proceeding should be governed by the usual rules of finality, res judicata and judicial review, provided that the employee affirmatively agrees to have his discharge resolved through the collective machinery.

The main focus of writers' attacks on allowing assertion of state rights of action has centered on the danger of undermining the finality of grievance determinations rendered under the terms of the collective process.[272] These commentators assert that, if the union makes a good faith determination not to carry a case to arbitration, that should be the end of it. In the context of Harry's original case, these commentators would respond that, even if his plight is lamentable, Harry's sacrifice is necessary to save the arbitration process as a whole from destruction. Thus, denying Harry access to state court accords with the weighty federal labor policy favoring arbitration, discerned by the Court in *Lincoln Mills, Lucas Flour* and the *Trilogy*, and reaffirmed in *Lueck*. Because the grievance and arbitration processes are at the very heart of the system of industrial self-governance, Harry's regrettable dilemma is thought to be necessary to preserve collective bargaining itself.[273] It is also thought that allowing unionized employees judicial access in lieu of the grievance machinery would ultimately undermine the interests of individual workers as well, since all would be relegated to the status of at-will employees with no union protection available.[274]

While this oft-repeated syllogism is not without superficial appeal, it is ultimately unpersuasive. The Court has discerned that, when Congress enacted the LMRA, it expressed a strong preference for the mechanism of private dispute resolution as a method of preventing industrial strife during the term of the agreement.[275] But previously created judicial ex-

271. *See, e.g.*, W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers, 461 U.S. 757, 766 (1983); Kane Gas Light & Heating Co. v. International Bhd. of Firemen, Local 112, 687 F.2d 673, 681-82 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983); Local P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, 680 F.2d 1142, 1144-45 (7th Cir. 1982); Perma-Line Corp. of America v. Sign Pictorial & Display Union, Local 320, 639 F.2d 890, 894-95 (2d Cir. 1981); Christensen, W.R. Grace & Co.: *An Epilogue to the Trilogy?*, 37 PROC. ANN. MEETING NAT'L ACAD. ARB. 21, 24 (1984); Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 287-89 (1980). *But cf.* Vosch v. Werner Continental, Inc., 734 F.2d 149, 154-55 (3d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985) (individual employees lack standing to set aside an award allegedly in violation of public policy unless they can show that their union breached its duty of fair representation or that the grievance procedure was substantially inadequate). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 593-98 (1976).

272. *See* sources cited *supra* note 88.

273. *Id.*

274. Pincus & Gillman, *supra* note 88, at 1039.

275. *See supra* text at notes 31-41.

ceptions to the requirement of exhaustion have not impinged negatively on employers' willingness to agree to arbitration provisions[276] (or on unions' ability to represent effectively its membership).

Arguably, however, wrongful discharge controversies have the potential for substantially greater interference with the current regime than FLSA or Title VII disputes.[277] Commentators and litigants have observed accurately that the largest percentage of arbitrations concern discharge and discipline.[278] Employers, they assert, will be more reluctant to agree to arbitration clauses, as unionized workers bring numerous individual actions in state court, thus undermining the efficacy of the collective grievance machinery as a useful method of dispute resolution.[279]

Underlying this argument must be the premise that, as judicial redress for wrongful discharge becomes increasingly available to unionized employees, such employees will prefer judicial to arbitral forums. This a priori assumption is wrong for several reasons. When unionized employees can obtain access to either forum, they ordinarily will choose arbitration. No court has thus far been willing to order specific performance, while reinstatement is the ordinary arbitral remedy for discharge without just cause. Even were state-created remedies to permit reinstatement, empirical evidence suggests that unionized workers will continue to choose arbitration, when the forum is available.[280] This result is hardly surprising because redress through arbitration is far more expeditious and all the costs are born by the union.[281]

By contrast, the seemingly interminable delay and heavy costs involved in litigation, even when a lawyer is retained on a contingency fee basis, do not warrant citation. In sum, if employees can choose a forum

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276. *See supra* note 80.

277. *See* commentary cited *supra* at note 88; Petitioner's Brief in support of Petition for the Writ of *Certiorari* in *Garibaldi* at 15.

278. *See FMCS Annual Report on Mediation and Arbitration*, 1 Collective Bargaining Negot. & Cont. (BNA) 10:991, 10:993 (1985).

279. *Supra* commentary cited *supra* at note 88.

280. *See* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, 28 PROC. ANN. MEETING NAT'L ACAD. ARB. 59, 76 (1975) (in only 25% of the discharge arbitrations surveyed involving alleged discrimination did the grievant file a charge with the EEOC or the courts); *see also* Malinowksi, *An Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Labor Arbitrators*, 36 ARB. J. No. 1, 31, 33, 45 (1981). ("Since there were so few cases involving multiple forums, one may infer that . . . individual [unionized] employees . . . are [not] involved in extensive litigation regarding discharge cases. . . . They may well believe that the grievance arbitrator will decide the matter to finality, and that a contractual procedure of this kind is still better than litigation in the courts and/or in the administrative agencies."); *cf.* Edwards, *Advantages of Arbitration Over Litigation: Reflections of A Judge*, 35 PROC. ANN. MEETING NAT'L ACAD. ARB. 16, 18, 23-24 (1983) [hereinafter Edwards, *Reflections*].

281. *See* Edwards, *Reflections, supra* note 280, at 23; *see also FMCS Annual Report, supra* note 278, at 10:991 (average time from filing of grievance at initial step of grievance procedure to rendering of arbitral award is 335.39 days). *See generally* F. ELKOURI & E. ELKOURI, *supra* note 17, at 7-9.

in which they usually will prevail expeditiously and without cost, even in states that permit punitive damages for wrongful terminations, unionized workers will continue to have weighty economic incentives to prefer arbitral to judicial forums. Thus, the threat to industrial stability has been overstated.

Nor will allowing unionized workers access to the courts to remedy unjust terminations pose a threat to industrial peace. Although economic strikes following the termination of a contract have tended to fluctuate cyclically,[282] strikes during the term of an agreement precipitated by an individual's isolated discharge are anomalous.[283] Further, it defies logic and common sense to posit that workers would be more inclined to engage in job actions to protest the discharge of an employee who had the ability to seek damage remedies in court, than to strike in support of a coworker left without remedy because the union refused to press her case to arbitration.

But what of the importance of uniform interpretation of the agreement? Giant's plants in Boston and Providence are covered by the same agreement. But the terms of this agreement might now be subject to differing interpretations by the courts of different states. Of course, uniform interpretation of the terms of the contract is of great importance, as the Court has recognized.[284] But this argument misses the mark. Since only those rights that spring independently of the agreement could be maintained in court, it will not be the agreement that the court will interpret. Workers in the several states may acquire different rights with respect to job security, but not by virtue of varying interpretations of the collective agreement. Rather, workers are afforded differing job security rights through the various regimes of state law established through our federal system—just as, for example, workers in various states acquire differing rights to minimum wage rates.

It would seem that protection against unjust termination would be a first order priority. Obviously, if an employer is free to fire employees indiscriminately, rights to other minimum labor standards become empty. Additionally, since Congress intended not to preempt state authority to promulgate minimum wage and health laws, there is no reason to assume that the Congress intended to deprive the states of the power to confer individual substantive rights respecting job security. In fact,

282. *See* Weiler, *supra* note 40, at 367-371.

283. *See* R. FREEMAN & J. MEDOFF, *supra* note 15, at 218. To the limited extent that midterm strikes have occurred, they are usually generated by conditions affecting multiple employees. Paradigmatic causes of mid-contract strikes are breakdowns in labor-relations, typified by the recent General Electric strike in New England and generalized grievances that affect many workers simultaneously, such as strikes over safety conditions, workloads or piece rates. *See* Maeroff, *Grievance Process Spurs Strikes at Three G.E. Plants Near Boston*, N.Y. Times, March 8, 1986, at 7D, col. 5; *see also* T. KOCHAN, *supra* note 15, at 396-97; Feller, *supra* note 18, at 765; *supra* note 30.

284. *See supra* text at note 35.

given the preoccupation of the Taft-Hartley Congress with the abuse of individual rights in the collective process, there is some reason to think the contrary proposition is true.[285]

But one can argue that state-imposed minimum substantive terms regarding job security are distinguishable from minimum wage and health insurance laws. This argument would have to be that state wrongful discharge actions are unlike a state substantive entitlement to wages or insurance because the state remedy includes the right to bypass the grievance procedure. Arguably the state-created right not only ignores the substantive terms agreed to by the parties, but also unduly interferes with the method of collective bargaining itself, since the grievance and arbitration procedure are part of the evolving collective bargaining process.

The arbitration process is virtually inseparable from the process of negotiation of the agreement. Through the grievance and arbitration machinery, life is breathed into the sterile words written on the pages in the agreement. Precedents and practices come into existence, and bargaining demands and positions are often framed with an eye toward changing or retaining the agreement as interpreted by the arbiter.[286]

It is thus true that the arbitral forum often plays a role that is vital to the larger collective bargaining process. But arbitrations involving discharges are closely akin to private adjudication; by contrast, disputes respecting the meaning of the language of the agreement are more closely akin to quasi-legislative rulemaking and have substantial collective implications. Though it is undeniable that individual discharge arbitrations in

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285. It is beyond cavil that congressional concern for the rights of individual union members loomed large in the passage of the Taft-Hartley Amendments. For a comprehensive and detailed overview of the legislative history of the LMRA, see H. MILLIS & E. BROWN, *supra* note 1, at 395-609. It was this concern for individual protection against discharge, precipitated by unions, that led to banning of the closed shop. Although far from dispositive, the following excerpt from the Senate Majority Report strongly suggests that the 80th Congress would have permitted the assertion of state wrongful discharge actions to ensure that individual unionized employees are provided with protection against unjust termination.

> In one instance a union member was subpenaed to appear in court, having witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job. . . . Numerous examples of equally glaring disregard for the rights of minority members of unions are contained in the exhibits received in evidence by the committee. . . . If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but . . . membership in [unions is often] essential to earning a living. . . .

S. REP. NO. 105, 80th Cong., 1st Sess. (1947), *reprinted in* 1 HISTORY OF THE LMRA, *supra* note 28, at 412-13; *see also* 93 CONG. REC. 4317-18 (1947) (remarks of Senator Taft) (to same effect) *reprinted in* 2 HISTORY OF THE LMRA, *supra* note 28, at 1096.

286. *See, e.g.*, Cox, *Reflections, supra* note 40, at 1490-1500; Cox, *Rights, supra* note 40, at 606-16; Feller, *supra* note 18, at 744-45; Shulman, *supra* note 30, at 1015-17; Summers, *Measuring the Union's Duty to the Individual: An Analytic Framework*, in THE CHANGING LAW OF FAIR REPRESENTATION 145, 156-57 (J. McKelvey ed. 1985); *see supra* note 40 and accompanying text.

some generalized sense help to shape the meaning of the "just cause" provision of the agreement,[287] the effect of the precedent flowing from any particular fact-centered discharge dispute is necessarily limited.[288] There is no debate among arbiters respecting the general contour and shape of the just cause provision; its meaning is well-developed and largely fixed.[289] Therefore, irrespective of which particular discharge case is before the arbitrator, the broad meaning of the clause will emerge largely unaffected.[290]

Discharge arbitrations are thus sui generis. They have little if any impact on the events that take place at the bargaining table when the term of the contract expires and the parties attempt to hammer out an amended "code of industrial self-government."

Finally, handling grievances and arbitrations enhances the prestige of unions among their members, as the Court and scholars have noted. Thus, any diminution in the union's role in adjusting the disputes of those whom it represents, it could be argued, will cause a corresponding decline in the union's collective image.[291]

The syllogism, however, is only correct in part. The union's reputation is enhanced only to the extent that it successfully administers the grievance and arbitration procedure. In the short term, discharge arbi-

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287. *See* Cox, *Reflections, supra* note 40, at 1490-1500; Cox, *Rights, supra* note 40, at 606-16; Shulman, *supra* note 30, at 1015-17; Summers, *supra* note 286, at 156-57.

288. VanderVelde, *supra* note 40, at 1089 n.24; *see id.* at 1122 (no conflicting collective interests amongst employees are at stake from the result of a fact-based grievance). Precedent and stare decisis play a relatively limited role in arbitral as compared to judicial proceedings, especially in the common ad hoc arbitral form. *See* Comment, *The Prospective Effect of Arbitration*, 7 INDUS. REL. L.J. 60, 61-65 (1985); O. FAIRWEATHER, PRACTICE AND PROCEDURE IN ARBITRATION 570-73 (BNA) (2d ed. 1983); Tobias, *supra* note 264 at 56 n.4; *supra* note 17. *See generally* F. ELKOURI & E. ELKOURI, *supra* note 17, at 414-36.

289. *See* Summers, *Time For a Statute, supra* note 2, at 500-01; Tobias, *supra* note 264, at 56 & n.4. *See generally* F. ELKOURI & E. ELKOURI, *supra* note 17, at 679-724.

290. It is not clear that the scholars whose works are cited for the various propositions comprising this argument would endorse the general tenor of my conclusion, with the exception perhaps of Professor VanderVelde. An excerpt from one of Professor Cox's seminal works will serve to illustrate the difference in emphasis.

> [T]he collective bargaining agreements usually provide that employees will not be discharged or disciplined "except for just case." Many of the grievances based upon such clauses turn upon questions of fact. . . . In these instances the disposition of the grievance does not immediately affect anyone other than the individual worker. . . .
>
> [However], [s]ome discharge cases involve important principles. . . . It seems fair to say . . . that the accumulation of a body of precedent giving content to the broad phrase "just cause" is a matter of practical concern to all employees. . . .

Cox, *Rights, supra* note 40, at 613.

Professor Cox's observation is trenchant. The point here is slightly different, however. Individual discharge grievances taken together pour meaning into the "just cause" provision. But, as set forth in the text, my argument is that over the course of the collective bargaining relationship, its general construction eventually would arise with the same meaning regardless of which particular cases the union brought before the arbiter. I do not think that my conclusion is necessarily in conflict with that reached by Professor Cox and the other scholars, but aimed at a different point.

291. *See supra* text at note 56.

trations may create an intra-group conflict over the distribution of union resources.[292] But in an industrial world in which at-will employees increasingly have protection against unjust dismissal, it is to the long-term advantage of the labor movement to arbitrate all but the most frivolous discharge grievances. It is myopic to take the view that foreclosing individual unionized employees from the assertion of independent rights to job security is necessary to preserve the integrity of arbitration and collective bargaining. The perverse end result of the saga of Harry and Sally—but for the union Harry would have had the opportunity to vindicate his rights—certainly cannot generate union loyalty or foster the collective process.

At the point of Sally and Harry's discharge, the UHW had petitioned the NLRB to schedule an election to determine whether a majority of Giant's Suburban employees desire the UHW to be their exclusive representative. As of late, rank-and-file trust in the union leadership has been declining. The membership is disgruntled with, among other things, the union's impotency to stop the loss of jobs to Giant's nonunion plants, which the membership blames on the union leadership's inability to conduct successful organizing drives. Distrust of union leadership often translates into decreased support for the union as an entity. When the membership of Harry's local learns that the UHW not only refused to arbitrate Harry's grievance but also that, as a result of the union's administration of the agreement, Harry was unable to seek redress in state court, the union's support is almost certain to dwindle further. Thus, since union solidarity is necessary to administer effectively the current agreement and to negotiate a new collective agreement, the collective bargaining power of the UHW, and the labor movement more generally, unavoidably will decline. It will be harder to win gains at the bargaining table. Failure to reach a salutary settlement at the bargaining table will further frustrate the union's ability to organize Giant's nonunion plants, making it again even more difficult to arrive at satisfying contract settlements in the future. More immediately, when company supervisors endlessly recount stories similar to those of Harry and Sally and when the union is unable to come up with adequate rejoinders, the

292. *See, e.g.*, VanderVelde, *supra* note 40, at 1122 n.126, 1145-46. Union resources are of course finite. A union may choose to arbitrate a particular grievance in lieu of another when it views the chosen grievance as more important or beneficial to the employees, even though the other grievance is meritorious. Furthermore, arbitrating a grievance imposes on the union an additional opportunity cost, which Professor VanderVelde calls "the nuisance value of bargaining leverage." That is, the union may use its choice of when to arbitrate as a tool to extract concessions from the employer in much the same way as the union may gain leverage from the selective use, or threat, of strikes. *Id.* at 1148-50. But, in this industrial order, nearly every discharge is of sufficient importance, both to the union and to the individual, to warrant a hearing before a neutral decisionmaker. I believe that, in the current social and legal environment, a union can ill afford to neglect a discharged employee whom it represents. The individual and collecxtive costs are simply too great.

UHW, and all unions, will be even less likely than they have been in the recent past to convince unorganized workers to vote for the union.

Thus, not only will Harry's individual rights be vitiated, but the inverted regime that would result if the majority view of the lower courts were to prevail would ultimately cause further erosion in the collective strength of the labor movement. This topsy-turvy outcome would certainly astonish and shock the drafters of the Wagner Act, who envisioned a regime hospitable to collective organization. Nor would this Alice-in-Wonderland reality receive bouquets from the framers of the Taft-Hartley Act, who ultimately remained committed to collective bargaining as the cornerstone of national labor policy, but were vitally concerned with the preservation of individual rights in the process.

CONCLUSION

The lower courts' misinterpretation of *Lueck* and failure to acknowledge *Metropolitan Life* has caused considerable harm. The misguided wrongful discharge decisions have harmed both the individual interests of employees and the collective interests of unions. Collective and individual interests may appear to diverge in the shortrun. But one does not have to look far to see that individual and collective concerns are not in conflict. In this tableau, the rights of individual workers and the strength of their unions are "inextricably intertwined."

Hopefully, before greater harm is wrought, the myopia that has plagued the lower courts will be corrected. The principles that emerge from *Lueck* and *Metropolitan Life* seem clear enough. State wrongful discharge actions brought by unionized employees should not be preempted or treated as section 301 claims simply because they are cognizable under the agreement. Rather, if the claim is nonnegotiable and not predicated on the agreement, its assertion should be permitted. Conversely, if the right of action is waivable or rooted in the agreement—if the right would not exist but for the contract—it should be dismissed.

The judicial vindication of nonnegotiable, nonderivative wrongful terminations by unionized employees is consonant with federal labor law policy. State wrongful discharge actions have at most a negligible effect on the process of collective bargaining. Additionally, it is inconceivable that the congressional designers of federal labor policy would have approved of the pathologically twisted result that comes from confining a unionized worker to the remedy in the agreement, simply because the discharge is cognizable under a just cause provision. Thus, when unions refuse to press a discharge case to arbitration and there is an independent, nonwaivable state right of action available, the requirement of exhaustion is incompatible with federal labor law policy.

Any attempt to peer into the future and to predict the future course

of Supreme Court decisionmaking is always a hazardous enterprise. Labor law preemption doctrine, in particular, has tended to be unstable and evanescent. It is not inconceivable that in future opinions the Court may veer from the course it charted in *Lueck* and *Metropolitan Life*. But the direction of the two decisions is clear and straight, and a proper reading of *Lueck* and *Metropolitan Life* leads to the conclusion that both individual rights and collective bargaining are better served by permitting rather than preempting state wrongful discharge actions brought by unionized employees.