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PREEMPTION OF STATE LAW CLAIMS
AFTER LINGLE v. NORGE

I. INTRODUCTION

The supremacy clause of the United States Constitution implicitly grants Congress the power to enact legislation which preempts state law. Congress exercised this power in passing the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA).

1. U.S. CONST. art. VI, cl. 2. The supremacy clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The supremacy clause, coupled with a congressional act within its delegated power, has the effect of preempting state law when the state law conflicts with federal law, or when the federal government has intended to “occupy the field.” L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-25 to -29, at 479-511 (2d ed. 1988).

3. The National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended by Pub. L. No. 80-101 and Pub. L. No. 86-257 (codified as amended at 29 U.S.C. §§ 151-169 (1982)). The NLRA was designed to remedy disruption in interstate commerce arising from labor disputes over representation and bargaining by granting federal protection to employees’ right to organize and join labor unions. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 21 (1976). The Act also declared certain employer activities illegal and set up an administrative agency, the National Labor Relations Board (NLRB or the Board) to monitor activities of employers and unions.

4. Labor-Management Relations Act (Taft-Hartley), Pub. L. No. 80-101, 61 Stat. 136, as amended by Pub. L. No. 86-257 (codified as amended at 29 U.S.C. §§ 141-197 (1982)). The LMRA supplemented and amended the NLRA as a response to the increase in union membership, greater use of the strike, and criticism that the NLRB had a tendency to overregulate employers. See R. GORMAN, supra note 3, at 5-6. In addition to providing federal court jurisdiction over suits to enforce labor contracts and making unions liable entities, the LMRA’s provisions: (1) gave the courts of appeals greater authority to review and set aside Board findings in unfair labor practice cases; (2) expressly limited what constituted unfair labor practices on the part of an employer and defined what constitutes unfair labor practices by unions; and (3) required unions to file reports on internal procedures and finances, and allowed employees to refrain from engaging in certain activities.


The constitutionality of the NLRA was tested in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The Court found, inter alia, that the employer unfair labor provisions in the NLRA did not deny the employer the liberty to contract without due process. Id. at 43-48. The Court also held that Congress’ regulation of labor relations is within its constitutional power to regulate interstate commerce under article I of the United States Constitution. Id. at 29-32. For a further discussion of the Jones & Laughlin case, see R. GORMAN, supra, at 21.
By regulating labor relations under these statutes, Congress sought to promote industrial peace and stability through a uniform body of law. However, Congress did not fully legislate the area of labor relations and left unclear which areas of state law remained unpreempted. Consequently, courts inherited the task of defining federal and state authority in labor relations.

The United States Supreme Court has articulated three major areas of preemption in labor law. This Note will focus on the third of these from joining unions. Id. For a discussion of the industrial unrest leading to the enactment of the LMRA, see C. Morris, supra note 3, at 35-45.

5. See R. Gorman, supra note 3, at 1.

6. See Cox & Scidman, Federalism and Labor Relations, 64 HArv. L. REV. 211, 212 (1950). The authors note: "[P]roblems of supremacy and accommodation are essentially issues of legislative policy. . . . Yet it is the practice for Congress to avoid the decision, thus leaving the problems to the Supreme Court. And the Court, paradoxically, then draws the necessary lines by asking—in form if not in actuality—where Congress drew them." Id. See also Gregory, The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?, 27 WM. & MARY L. REV. 507, 514-17 (1986) ("Judicial discernment of legislative intent usually is a myth designed to camouflage judicial policymaking.").

7. See Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (state law preempted if "it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States") (citation omitted).

According to one commentator, even if "legislative intent were clear . . . labor preemption decisions still would have to transcend mechanistic determinations. Only the Court properly can make these complex policy decisions because they are not the product of statutory construction alone; they also are the product of overriding federalism and supremacy principles grounded in the Constitution." Gregory, supra note 6, at 517 (footnote omitted).

8. The first area of preemption was developed in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). In Garmon, the Supreme Court considered the extent of the jurisdiction of the NLRB over §§ 7 and 8 of the NLRA. Section 7 of the act protects certain "concerted activities" while § 8 prohibits "unfair" labor practices. 29 U.S.C. §§ 157, 158 (1982). The Court in Garmon concluded that both state and federal courts must defer to the NLRB when the subject matter of the claim is "arguably subject to § 7 or § 8 of the Act." Garmon, 359 U.S. at 245. The Garmon holding is known as the "primary jurisdiction doctrine." See Smith & Kays, Preempting State Regulation of Employment Relations: A Model for Analysis, 20 U.S.F. L. REV. 55, 36 (1985). This doctrine requires that state courts not decide disputes within the primary jurisdiction of the NLRB because conflicting adjudication by the courts and the NLRB would undermine the uniform scheme which Congress intended when enacting the NLRA. See Garmon, 359 U.S. at 246; C. Morris, supra note 3, at 788-89.

There are exceptions to the Garmon "primary jurisdiction doctrine." First, there is no preemption when the state law only remotely affects the NLRA. Garmon, 359 U.S. at 243-44 (citing International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958)). There is no preemption where the state is regulating activity which is "deeply rooted in local feeling and responsibility." Id. at 244. For a discussion of the Garmon doctrine and its exceptions, see Gregory, supra note 6, at 523-50 (after Garmon, steady erosion of labor preemption occurred through judicial exceptions); Weeks, NLRA Preemption of State Common Law Wrongful Discharge Claims: The Bhopal Brigade Goes Home, 13 Pepperdine L. REV. 607, 621-60 (1986).
areas—preemption under section 301 of the LMRA. In section 301 of the LMRA, Congress made collective bargaining agreements enforceable as contracts and bestowed on federal courts the jurisdiction to enforce these labor contracts on behalf of both parties to the contract. To this end, section 301 also allows federal courts to create a body of federal labor law for purposes of interpreting and enforcing these labor contracts. Section 301 preempts any state causes of action for con-

The second area of preemption analysis focuses upon whether Congress intended the conduct involved to be unregulated and left "to be controlled by the free play of economic forces." NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971). The Court used this analysis in Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). In International Machinists the Supreme Court held that federal labor policy preempted the authority of a state labor relations board to regulate the use of economic weaponry because Congress had intended that conduct not be regulated at all. The Court found that a union's refusal to work overtime was self-help economic activity which Congress intended to leave unregulated. Id. at 148-49.

There are exceptions to this preemption doctrine. See, e.g., Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state statute requiring minimum mental health care benefits for employees not preempted under NLRA or ERISA); Malone v. White Motor Corp., 435 U.S. 497 (1978) (state statute on pension rights not preempted because of express congressional approval of state regulation).

9. 29 U.S.C. § 185 (1982). Section 301 of the LMRA states in pertinent part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .

(b) Any labor organization . . . . [m]ay sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.

Id.

The majority of suits brought under § 301 are actions to enforce arbitration awards or promises to arbitrate. R. Gorman, supra note 3, at 547. The Supreme Court has stated that the agreed-upon grievance-arbitration procedures must be exhausted before bringing an action under § 301. See Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). For a further discussion of Maddox and exhaustion of grievance-arbitration procedures, see infra notes 36-42 and accompanying text. Most collective bargaining agreements have provisions concerning the resolution of contract disputes and one of the final steps in dispute resolution is arbitration. See O. Fairweather, Practice and Procedure in Labor Arbitration (1983); R. Gorman, supra note 3, at 541. Arbitration can be conducted before an individual or a panel and the arbitrator may be designated on an ad hoc or permanent basis. O. Fairweather, supra, at 80-81.

10. See Textile Workers v. Lincoln Mills, 353 U.S. 448, 451-54 (1957) (section 301 was designed to promote industrial peace by conferring jurisdiction on federal courts to enforce labor contracts on behalf of either party); see also 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 421 (1985) [hereinafter LEGISLATIVE HISTORY LMRA] (collective bargaining contracts are to be equally binding and enforceable on both parties in order to stabilize industrial peace). See generally Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 HARV. L. REV. 1, 274 (1947).

11. Lincoln Mills, 353 U.S. at 451, 456. The Court in Lincoln Mills looked to
tract violations between an employer and a labor organization. Further, the only contractural obligations enforceable in courts are violations of the grievance and arbitration procedures. Unlike other bases for labor preemption, which balance state and federal interests, section 301 preemption requires that all “incompatible doctrines of local law must give way to principles of federal labor law.”

The legislative history of section 301 suggests: (1) that the grievance and arbitration process be exhausted before a section 301 action may be brought; (2) that arbitration awards be given effect; and (3) that obligations under the collective bargaining agreement be defined by federal law. Past Supreme Court cases interpreting the preemptive effect of section 301 have largely given effect to these policies. How-

the record of the House debate where “it became abundantly clear that the purpose of the section was to provide the necessary legal remedies.” Id. at 455. The Court concluded that the substantive law to apply in suits under § 301 is federal common law fashioned from federal labor policy. Id. at 456. See also Legislative History LMRA, supra note 10, at 423 (language from Senate Report contained in Lincoln Mills). For a further discussion of Lincoln Mills, see infra notes 25-31 and accompanying text.

12. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987) (“[section] 301’s preemptive force is so powerful as to displace entirely any state cause of action” within its scope) (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983)).


14. See, e.g., Malone v. White Motor Corp., 435 U.S. 497, 504-05 (1978) (no preemption where Congress has impliedly or expressly left some regulation to states with respect to issues which may be subjects of collective bargaining); Farmer v. United Bhd. of Carpenters & Joiners of America, Local 51, 429 U.S. 290, 302 (1977) (no preemption under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), where “the State has a substantial interest in regulation of the conduct at issue and the State’s interest is one that does not threaten undue interference with the federal regulatory scheme”).

15. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962) ("[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.'") (quoting Pennsylvania R.R. v. Public Serv. Comm’n, 250 U.S. 566, 569 (1919)).


16. For a discussion of each of these § 301 principles, see infra notes 21-42 and accompanying text.

17. For a discussion of past Supreme Court decisions that have given effect to § 301 policies, see infra notes 21-42 and accompanying text.
ever, in *Lingle v. Norge Division of Magic Chef, Inc.*, the Supreme Court held that section 301 preempts state law claims only if interpretation of the collective bargaining agreement is required when applying state law. This decision represents a departure from the Court's interpretation of section 301 during the past thirty years in that: (1) the use of the grievance and arbitration procedures is not required; (2) the arbitrator's award is not given effect; and (3) uniform interpretation of obligations under labor contracts is frustrated by state court interpretations of state law claims which affect the employment relationship. Part II of this Note reviews the history of section 301 preemption. Part III examines the split among the circuits before *Lingle* on the issue of whether section 301 preempts state law claims and discusses the *Lingle* decision, which purports to resolve this split of authority. Part IV then analyzes the *Lingle* decision and concludes that *Lingle* frustrates the policies underlying section 301 and does not relieve the tension between state law claims and section 301 preemption. Part V illustrates this continued tension by discussing decisions since *Lingle*.

II. BACKGROUND

A. Congressional Intent and the Principles Underlying Section 301 Preemption

The Supreme Court generally begins preemption analysis by examining congressional intent concerning the preemptive effect of a federal statute. However, Congress did not explicitly state whether, and to what extent, section 301 preempted state law. Consequently, the Supreme Court has interpreted the preemptive effect of section 301 by identifying and giving effect to the policies behind the section.

19. Id. at 1885. For a discussion of the facts and holding of *Lingle*, see infra notes 121-54 and accompanying text.
20. For a discussion of the effect of *Lingle*, see infra notes 155-80 and accompanying text.
22. Allis-Chalmers, 471 U.S. at 208; see also Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955) (Congress did not exhaust full sweep of legislative power over industrial relations—obvious conflict, actual or potential, with federal authority, results in easy exclusion of state action); Garner v. Teamsters Union, 346 U.S. 485, 488 (1953) (LMRA "leaves much to the states, though Congress has refrained from telling us how much").
23. See Allis-Chalmers, 471 U.S. at 209-13. Cf. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 256, 240 (1959) ("[T]he task was cast upon this Court in carrying out with fidelity the purposes of Congress, but doing so by giving application to congressional incompletion."). The issue of lack of con-
The Supreme Court has articulated several policies underlying the application of section 301 to labor contract actions. The first of these policies is that labor contracts need uniform interpretation to ensure smooth negotiation and administration of collective bargaining agreements. The Supreme Court advanced this policy in *Textile Workers v. Lincoln Mills*.

In *Lincoln Mills*, the Court looked to the text of section 301 and its legislative history to determine whether federal courts had authority to enforce provisions in a collective bargaining agreement. The Court found that one of the purposes of section 301 was the enforcement by either party of collective bargaining agreements as contracts in federal courts. Through enforcement of collective bargaining agreements in this area, the possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made measurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.

24. See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). In *Lucas Flour*, the Court stated:

The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made measurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.

Id. at 103.

25. 353 U.S. 448 (1957). In *Lincoln Mills*, a union and an employer had entered into a collective bargaining agreement which provided that grievances would be handled pursuant to a specified procedure. Id. at 449. The issue in the case concerned several grievances filed and processed through the specified grievance procedure to the final step of arbitration. Id. The employer refused to arbitrate and the union brought suit to compel arbitration. Id. The district court ordered the employer to comply with the grievance arbitration procedures and the court of appeals reversed holding that the district court had no authority to grant relief. Id.

26. Id. at 451-52. The Court looked to subsections of § 301 and concluded that subsection (a) supplied the basis for jurisdiction over labor contracts in the federal courts. Id. The Court also concluded that subsection (a) allowed specific enforcement of the contracts. Id. Subsection (b) made it possible for a labor organization to sue or be sued. Id. For the full text of § 301, see supra note 9.

The Court also looked to and cited extensively from Senate, House and Conference reports which accompanied passage of the LMRA. *Lincoln Mills*, 353 U.S. at 452-56. The Conference Report stated: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." Id. at 452 (quoting H.R. CONF. REP. No. 510, 80th Cong., 1st Sess., at 42 (1947)). The Court pointed out that both the Senate and the House provided for the "usual processes of the law" by provisions substantially equivalent to § 301(a) in its present form. Id. at 453.

27. *Lincoln Mills*, 353 U.S. at 454. The Court stated:

[...] to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal...
agreements as contracts, parties would be held to a higher degree of responsibility and, thus, further the congressional intent of promoting industrial peace.\textsuperscript{28} The Court stated that the “agreement to arbitrate grievance disputes is the \textit{quid pro quo} for an agreement not to strike” and thus section 301 does more than confer jurisdiction in the federal courts over labor organizations.\textsuperscript{29} The Court stated that section 301 not only confers jurisdiction in federal courts over both parties to an agreement, but also allows federal courts to provide the necessary legal remedies.\textsuperscript{30} Therefore, the Court held that section 301 authorizes federal courts to fashion a body of federal common law for the enforcement and interpretation of collective bargaining agreements.\textsuperscript{31}

In \textit{Teamsters Local v. Lucas Flour Co.},\textsuperscript{32} the Court stressed that the purpose of uniform interpretation is to protect the keystone of the federal scheme—the ordering and adjusting of competing interests through collective bargaining.\textsuperscript{33} The Court stated that state law which frustrates the smooth functioning of that process would strike at the very core of federal labor policy.\textsuperscript{34} To further this policy of uniform interpretation, the Supreme Court has stated that this federal common law applies to all section 301 actions, whether brought in state or federal court.\textsuperscript{35}

Another major policy underlying section 301 is the promotion and protection of collectively-bargained grievance-arbitration procedures in order to maintain peaceful labor relations.\textsuperscript{36} The Supreme Court, in entities and against unions as legal entities in the Federal courts in disputes affecting commerce.

\textit{Id.} (quoting S. REP. No. 105, 80th Cong. 1st Sess., at 16 (1947)).

\textsuperscript{28.} \textit{Id.}

\textsuperscript{29.} \textit{Id.} at 455.

\textsuperscript{30.} \textit{Id.} “[S]ection 302 [substantial equivalent of § 301], the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances . . . .” \textit{Id.} at 455-56 (quoting 93 CONG. REC. 3656-57 (1947)) (statement of Rep. Barden during debate on floor of House of Representatives).

Professor Gorman agrees with this reasoning. He states that if both sides to a collective bargaining agreement know they will be held to their promises to resolve conflict through arbitration, use of economic weaponry—the strike—becomes a secondary remedy. R. GORMAN, \textit{supra} note 3, at 545.

\textsuperscript{31.} \textit{Lincoln Mills}, 353 U.S. at 451, 456.

\textsuperscript{32.} 369 U.S. 95 (1962).

\textsuperscript{33.} \textit{Id.} at 104.

\textsuperscript{34.} \textit{Id.}

\textsuperscript{35.} \textit{Avco Corp. v. Aero Lodge No. 735}, 390 U.S. 557, 560 (1968); \textit{Charles Dowd Box Co. v. Courtney}, 368 U.S. 502 (1962) (state courts have concurrent jurisdiction over § 301 claims).

\textsuperscript{36.} \textit{Republic Steel Corp. v. Maddox}, 379 U.S. 650, 653 (1965). The \textit{Maddox} Court stated, “Congress has expressly approved contract grievance procedures as a preferred method for settling disputes . . . .” \textit{Id.} Section 203(d) of the LMRA states: “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising
Republic Steel Corp. v. Maddox,\(^{37}\) furthered this policy by holding that parties to a collective bargaining agreement must exhaust the grievance-arbitration procedures under the agreement before bringing a section 301 action in federal court.\(^{38}\) In a series of cases known as the Steelworkers' Trilogy, the Supreme Court articulated the preference for arbitration as the method for final dispute resolution.\(^{39}\) In United Steelworkers v. En-

over the application or interpretation of an existing collective bargaining agree-


38. Id. at 652. The Maddox Court, in establishing this exhaustion require-

ment, stated:

A contrary rule which would permit an individual employee to
completely sidestep available grievance procedures in favor of a lawsuit
has little to commend it. . . . [I]t would deprive [the] employer and
[the] union of the ability to establish a uniform and exclusive method
for orderly settlement of employee grievances. If a grievance proce-
dure cannot be made exclusive, it loses much of its desirability as a
method of settlement. A rule creating such a situation "would inevita-
ably exert a disruptive influence upon both the negotiation and adminis-
tration of collective agreements."

Id. at 653 (quoting Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 103
(1962)).

39. The three cases constituting the trilogy are: United Steelworkers v. En-
terprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. War-
rrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v.
American Mfg. Co., 363 U.S. 564 (1960). In these cases, the Court discussed the
role of courts and the relationship of the judiciary to arbitration proceedings.
The Court emphasized the lack of institutional competence of courts in contrast
to that of arbitrators, the centrality of arbitration to collective bargaining and the
vital role arbitration plays in industrial peace and stability. Herman, Wrongful
Discharge Actions After Lueck and Metropolitan Life Insurance: The Erosion of Indi-
nual Rights and Collective Strength?, 9 INDUS. REL. L.J. 596, 606-07 (1987); see also Coleman, Muddy Waters: Allis-Chalmers and the Federal Policy Favoring Labor Arbi-
tration, 44 WASH. & LEE L. REV. 345, 355-64 (1987); Heinsz, Judicial Review of
Arbitration Awards: The Enterprise Wheel Goes Around and Around, 52 Mo. L.

In the first case in the trilogy, American Manufacturing, the Court compelled
arbitration in a suit by a union involving a dispute over a specific contract provi-
sion. American Mfg., 363 U.S. 564. The collective bargaining agreement be-
tween the union and the employer contained a provision providing that all
disputes over contract terms must go to arbitration. Id. at 565. The Court
stated that, in this situation, its involvement was limited by the established policy
favoring private resolution of employment disputes. Id. at 567-68. Therefore,
the Court could only determine "whether the party seeking arbitration is making
a claim which on its face is governed by the contract." Id. at 568.

In the second case in the trilogy, Gulf Navigation, the Court compelled arbi-
tration even where Warrior & Gulf had inserted language in the agreement stat-
ing that "matters which are strictly a function of management shall not be
subject to arbitration." Gulf Navigation, 363 U.S. at 576. The Court reasoned
that the language in the agreement did not overcome the policy favoring arbitra-
tion; that arbitration was a substitute for industrial strife and not just a substitute
for litigation; and that disputes should be resolved through arbitration "unless it
may be said with positive assurance that the arbitration clause is not susceptible
of an interpretation that covers the asserted dispute." Id. at 578-83. See also Coleman, supra, at 356-59 (discussing federal labor policy favoring arbitration).
In Enterprise Wheel & Car Corp.,40 the third case in the Trilogy, the Court addressed the issue of when a court should review an arbitrator’s award. The Court stated that the federal policy favoring labor dispute resolution through grievance-arbitration procedures required courts to review the merits of an arbitration award only if it exceeded the arbitrator’s scope of authority to interpret and apply the collective bargaining agreement.41 The Court asserted that plenary review by courts on the merits of arbitration awards would undercut the finality of arbitration award provisions relied on by both parties to collective bargaining agreements.42

B. Exceptions to Federal Policy Favoring Arbitration

There are three situations in which the Supreme Court has held that an individual’s right of action derived from an employment relationship overrides the federal labor policy of favoring grievance-arbitration procedures contained in the collective bargaining agreement. In these instances, the individual employee is not required to exhaust the grievance-arbitration procedures. The first is where an employer by its actions has repudiated the grievance-arbitration procedure.43 The second is where an employee brings suit against the union for a breach of

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40. 363 U.S. 593 (1960). In Enterprise Wheel, the union and the employer had entered into a collective bargaining agreement containing provisions covering suspension and discharge of employees and outlining the grievance arbitration process. Id. at 594-95. The union brought an action in federal district court after the employer refused to arbitrate a dispute over discharged employees. Id. at 595. The district court ordered arbitration, and the arbitrator subsequently found for the employees and awarded reinstatement with back pay, minus pay for a suspension period and income from other employment. Id. The district court subsequently ordered the employer to comply with the arbitrator’s award. Id.

The court of appeals agreed that the district court had jurisdiction to enforce an arbitration award under a collective bargaining agreement. Enterprise Wheel & Car Co. v. United Steelworkers, 269 F.2d 327, 332 (4th Cir. 1959), rev’d on other grounds, 363 U.S. 593 (1960). However, the court of appeals found the arbitrator’s award to be unenforceable because it did not specify the amounts to be deducted from the back pay, and it awarded back pay subsequent to the date of termination of the collective bargaining agreement. Id. The court of appeals thus remanded the case to complete the arbitration on the questions of the amount due to the grievant for loss of time. Id.

41. Enterprise Wheel, 363 U.S. at 597-98. The Court stated:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597 (emphasis added).

42. Id. at 598-99.

its duty of fair representation. The third is where an individual has asserted a substantive right derived from a federal statute. An example of the final exception is demonstrated in *Alexander v. Gardner-Denver*, see id. at 185-90. In *I'aca*, the Court noted that an employee would be excepted from the Maddox exhaustion requirement where the union has sole responsibility for arbitration and acts in an arbitrary, discriminatory or bad faith manner in refusing to process the employee’s grievance. *Id.* at 185, 190. For a discussion of Maddox, see supra notes 37-38 and accompanying text.

In *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), the Court held that “enforcement of the finality provision where the arbitrator has erred is conditioned upon the union’s having satisfied its statutory duty fairly to represent the employee in connections with the arbitration proceedings.” *Id.* at 571. In his dissent, Justice Rehnquist asserted that “the Court has cast aside the finality of arbitration decisions and established a new policy of encouraging challenges to arbitration decrees by the losing party on the ground that he was not properly represented.” *Id.* at 574 (Rehnquist, J., dissenting). See generally J. McKelvey, *The Duty of Fair Representation* (1977); Coleman, supra note 39, at 365 (in order to advance peaceful resolution of industrial strife, courts must recognize exception to federal labor policy favoring arbitration when employee proves breach of duty of fair representation).

Relatively few allegations of unfair representation involve the union’s handling of arbitration but, rather, involve grievance handling prior to arbitration. See Herman, supra note 39, at 651 & n.268.

Gardner-Denver and its progeny are not § 301 cases. However, the policies outlined in the case affect a § 301 analysis. The *Lingle* Court relied in part on these cases in holding that federal law did not preempt the state law claim in *Lingle*. Thus, an understanding of *Gardner-Denver* and its progeny is useful in understanding the *Lingle* analysis. For a discussion of *Lingle*, see infra notes 121-54 and accompanying text. The *Gardner-Denver* analysis has been applied in other cases involving federal statutes.

For example, in *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981), the Court held that a binding arbitration clause and the arbitrator’s prior decision did not preclude a Fair Labor Standards Act (FLSA) claim. *Id.* at 745. The Court stated that “statute[s] designed to provide minimum substantive guarantees” are not suited for binding resolution by arbitration. *Id.* at 737. The Court reasoned that the statutory enforcement scheme granted nonwaivable rights of action to individuals that take precedence over conflicting provisions in a collective bargaining agreement. *Id.* at 740-41.

The Court rejected preclusion of a statutory claim, if the employee submitted the claim to arbitration, for three reasons: (1) because unions, focused on maximizing overall compensation in processing grievances, could act in good faith to decline to process some individual grievance despite the breach of FLSA rights; (2) arbitrators may lack familiarity with FLSA principles or be prevented by the collective bargaining agreement from following them; and (3) arbitration procedures are less protective of individual statutory rights and arbitrators may be unable to grant relief available under FLSA. *Id.* at 739-45.

In *McDonald v. City of West Branch*, 466 U.S. 284 (1984), the Court held that an arbitrator’s decision did not have collateral estoppel or res judicata effect in a subsequent suit for damages based on § 1983 of the Civil Rights Act. *McDonald*, 466 U.S. at 289. The Court offered four reasons why the arbitration procedure is not adequate to allow such preclusive effect: (1) arbitrators lack expertise in handling the “complex legal questions that arise in 1983 actions”; (2) an arbitrator’s authority is derived from the labor contract which may not allow enforcement of § 1983; (3) the union’s interest may conflict with that of the individual employee; and (4) arbitral fact finding was not an adequate
In *Gardner-Denver*, the Court held that an arbitrator's prior finding in a race discrimination suit did not preclude a subsequent Title VII suit. The Court stated that the two federal policies—in favor of arbitration of labor disputes and against discriminatory employment practices—could best be accommodated by allowing pursuit of a remedy under both the grievance-arbitration clause and a Title VII cause of action. The Court gave two primary reasons for allowing a statutory claim under Title VII after an arbitrator's finding: (1) procedurally, Title VII vests federal courts with plenary powers to enforce statutory requirements; and (2) Congress intended Title VII to supplement, rather than supplant, other laws and institutions relating to employment substitute for the judicial fact-finding anticipated by Congress in creating § 1983. *Id.* at 289-92.


46. 415 U.S. 36 (1974). In *Gardner-Denver*, Alexander, a black man, was initially hired to perform maintenance work and subsequently was promoted to a trainee drill operator. *Id.* at 38. Alexander was discharged for allegedly producing too many defective parts. *Id.* He filed a grievance under the collective bargaining agreement stating that he had been "unjustly discharged," but he did not explicitly claim that racial discrimination motivated that discharge. *Id.* at 39. The collective bargaining agreement contained three provisions relating to discharge. First, the company retained "the right to hire, suspend or discharge [employees] for proper cause." *Id.* Second, the agreement contained a provision providing that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* Finally, another provision stated that "[n]o employee will be discharged, suspended or given a written warning notice except for just cause." *Id.*

The agreement also contained an arbitration clause which set forth the steps in the grievance procedure. *Id.* at 40-41. The final step in the procedure was compulsory arbitration where the arbitrator's decision would be "final and binding" upon the parties. *Id.* at 41-42. Alexander raised his claim of racial discrimination in the final pre-arbitration stage. *Id.* at 42. The arbitrator ruled that Alexander had been "discharged for just cause" with no reference to Alexander's claim of racial discrimination.

47. *Gardner-Denver*, 415 U.S. at 59-60. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), was enacted to ensure "equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, national origin, or ancestry." *Gardner-Denver*, 415 U.S. at 44 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) and Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)). A violation of Title VII can be proved either under a disparate treatment theory as in *McDonnell Douglas* or a disparate impact theory as in *Griggs*. H. PERRITT, *supra* note 15, at 45-46. Title VII has two procedural stages: the first is an administrative stage and the second a judicial stage with de novo review by federal courts. *Id.* at 46-47. An employee who wishes to assert a Title VII claim must file her claim with a state administrative agency and, subsequently, with a federal administrative agency, the Equal Employment Opportunity Commission (EEOC). *Id.* The EEOC has a specified period in which to either seek a conciliation agreement from the employer, issue a right-to-sue letter which permits the individual to file suit or file suit on behalf of the charging party. *Id.* at 47.

discrimination. The Court stated that the doctrine of election of remedies did not apply in this situation because the employee sought vindication of a contractual right by submitting a grievance to arbitration, whereas under Title VII the employee asserted an "independent statutory right[] accorded by Congress." The Court rejected the proposition that Alexander waived his Title VII cause of action by accepting protections under the collective bargaining agreement, stating that this substantive right was not the type of right which could be waived. The Court dismissed the lower courts' reasoning that to allow an employee to bring his claim in both the arbitral and judicial forums would be unfair to the employer because only the employer would be bound by the arbitral award. The Court stated that an action under Title VII is not a review of the arbitrator's decision, but rather a statutory right independent of the arbitration process. As to whether the employee's double bite at the apple would undermine the employer's incentive to arbitrate, the Court asserted that the employer's primary incentive to arbitrate—the union's promise not to strike—is not undermined by allowing the employee a judicial remedy under Title VII.

Finally, the Court rejected the employer's suggestion that federal courts should defer to arbitral decisions on discrimination claims. The Court asserted that arbitral processes are not appropriate forums for final resolution of rights created by Title VII because (1) the arbitrator's role and special competence is the "law of the shop, not the law of the land," (2) the factfinding process in arbitration is not equivalent to

49. Id. at 47-49.
50. The Court stated that the doctrine of election of remedies applies to "situations where an individual pursues remedies that are legally or factually inconsistent." Id. at 49 (footnote omitted).
51. Id. at 49-50. The Court analogized this situation to the procedure under the NLRA where disputes may involve both contractual and statutory rights. Id. at 50.
52. Id. at 51. The Court distinguished between rights capable of waiver and those rights which are not, stating: "[R]ights . . . conferred on employees collectively to foster the processes of bargaining . . . may be exercised or relinquished by the union . . . . [Title VII rights] can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." Id.
53. Id. at 54.
54. Id. Thus, the Court stated that there was no unfairness to the employer because "Title VII does not provide employers with a cause of action against employees. [A]n employer cannot be the victim of discriminatory practices." Id.
55. Id. at 54-55.
56. Id. at 55-59. Gardner-Denver proposed that federal courts should defer to arbitral decisions where: "(i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy." Id. at 55-56 (footnote omitted). This proposal is analogous to the NLRB's policy of deferral. Id. at 56 n.17.
judicial factfinding, and (3) the procedures of arbitration are not equivalent to those of the judicial forum.\textsuperscript{57}

In \textit{Metropolitan Life Insurance Co. v. Massachusetts}\textsuperscript{58} and \textit{Fort Halifax Packing Co. v. Coyne},\textsuperscript{59} when confronted with determining whether federal statutes preempted state statutes that affected terms of collective bargaining agreements, the Supreme Court extended its reasoning in \textit{Gardner-Denver}. The Court also applied this reasoning when analyzing a state law claim in \textit{Lingle};\textsuperscript{60} therefore, the analysis used in the two recent Supreme Court decisions is useful in understanding the \textit{Lingle} decision.

In \textit{Metropolitan Life} the Supreme Court held that section 301 did not preempt a state-mandated health benefit law.\textsuperscript{61} The Court addressed the issue of the state law's interference with substantive terms of collective bargaining agreements, stating that "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck."\textsuperscript{62} The Court then extended the reasoning of \textit{Gardner-Denver} and stated that state minimum labor standards give individual rights independent of the collective bargaining agreement and, thus, have only an indirect effect on the policies behind the NLRA.\textsuperscript{63} The Court concluded that the purposes of the NLRA would not be furthered if unionized employees were not allowed the benefit of state la-

\textsuperscript{57} Id. at 57-58. The Court noted that in arbitration proceedings the record is not as complete, the rules of evidence do not apply, and procedures such as discovery and cross-examination are often limited or unavailable. \textit{Id}. The Court also rejected as a solution the deferral standard adopted by the Fifth Circuit. \textit{Id}. at 58 (citing Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972) (allowing deference to decision of arbitrator in Title VII actions in certain explicitly defined situations)).

The Court stated that a deferral rule might adversely affect the arbitration system in two ways: (1) by making the system more complex, expensive and time-consuming in order to insure effectuation of Title VII rights; and (2) by lessening the possibility of voluntary compliance or settlement of Title VII claims because employees may elect to bypass arbitration. \textit{Id}. at 59.

\textsuperscript{58} 471 U.S. 724 (1985).

\textsuperscript{59} 482 U.S. 1 (1987).

\textsuperscript{60} For a discussion of the facts and holding in \textit{Lingle}, see infra notes 121-54 and accompanying text.

\textsuperscript{61} In \textit{Metropolitan Life}, the Massachusetts Attorney General brought suit against two insurance carriers for declaratory and injunctive relief to enforce a state statute requiring minimum mental health care coverage for employees insured under a general insurance policy, accident or sickness insurance policy, or an employee health care plan that covers hospital and surgical expenses. \textit{Metropolitan Life}, 471 U.S. at 727, 734. The Court dealt with two preemption issues in \textit{Metropolitan Life}: preemption under ERISA and under the NLRA. The Court held that ERISA did not preempt the Massachusetts statute because the statute was a "law which regulates insurance" which would not fall within ERISA. \textit{Id}. at 758.

\textsuperscript{62} \textit{Id}. at 753.

\textsuperscript{63} \textit{Id}. at 755 (citing \textit{Barrentine v. Arkansas-Best Freight Sys.}, 450 U.S. 728 (1981)). For a discussion of \textit{Barrentine} and \textit{Gardner-Denver}, see supra notes 45-57 and accompanying text.
The Supreme Court also held, in *Fort Halifax*, that section 301 did not preempt a Maine statute requiring one-time severance pay for employees.\(^6\) There, the Court concluded that preemption was not required because the state statute contained "a minimum labor standard that does not intrude upon the collective bargaining process."\(^6\) Although the Court acknowledged that the Maine statute gave employees something they otherwise would have bargained for and, under the statute, could still bargain for, the Court stated that "[i]f impasse is reached... state law determines the right of employees to a certain level of severance pay."\(^6\) In both *Metropolitan Life* and *Fort Halifax* the Court stressed the fact that the establishment of labor standards fell within the traditional police power of the state and, thus, preemption in this area should not be "lightly inferred."\(^6\)

C. *Section 301 Preemption and State Tort Actions*

A section 301 case generally arises as a contract claim with one party to the collective bargaining agreement asserting that the agreement has been violated.\(^6\) The previously discussed policies underlying section 301 and articulated by the Supreme Court were developed in a

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\(^6\) *Metropolitan Life*, 471 U.S. at 755-56 (citing *Barrentine*, 450 U.S. at 39). The Court stated that "[n]o 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." *Id.* at 754-55 (emphasis added).

Further, the Court stated: "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 on nonunion employers." *Id.*

\(^6\) 482 U.S. 1 (1987). In *Fort Halifax*, terminated employees of a closed poultry and processing plant brought suit seeking severance pay under a Maine statute providing one-time severance pay for employees not covered by a contract dealing with severance pay. *Id.* at 4. Under authority granted by the Maine statute, the state Director of the Bureau of Labor Standards filed suit to enforce the law. *Id.* The Director's suit superseded the employees' previously filed suit. *Id.*

\(^6\) *Id.* at 7. The Court also addressed the issue of ERISA preemption and held the statute was not preempted by ERISA because the statute "neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under that federal statute." *Id.*

\(^6\) *Id.* at 21. The Court further stated that the fact that "a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for 'there is nothing in the NLRA... which expressly forecloses all state regulatory power with respect to those issues... that may be the subject of collective bargaining.'" *Id.* at 21-22 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978)).

\(^6\) *Id.* at 21; *Metropolitan Life*, 471 U.S. at 758.

\(^6\) R. GORMAN, *supra* note 3, at 547.
In Allis-Chalmers Corp. v. Lueck, the Supreme Court explicitly interpreted section 301 preemption for the first time in the context of a state tort action, as opposed to a contract action based on a violation of the collective bargaining agreement. In Allis-Chalmers, 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 be treated as a section 301 claim . . . or dismissed as preempted by federal labor-contract law." However, the Court stated that not all disputes relating to employment were preempted. Only rights which were capable of consensual waiver were preempted, as opposed to an individual's substantive rights derived from an independent body of law that could not be avoided by contractual agreement. The Court stated that the focus of

70. For a discussion of the policies underlying § 301, see supra notes 21-42 and accompanying text.

71. 471 U.S. 202 (1985). Allis-Chalmers involved the state tort of bad faith handling of an employee's claim under a disability insurance plan. Id. at 203. The insurance plan was included in the collective bargaining agreement, but the employee did not seek redress through the grievance channels created by the agreement. Id. at 204-06. The issue for the Court was whether the state law tort claim "would frustrate the federal-labor contract scheme established in § 301" and would thus be preempted by § 301. Id. at 209.

72. See Herman, supra note 39, at 626.

73. Allis-Chalmers, 471 U.S. at 220. The Court stated:

[Questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of the 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 substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Id. at 211.

74. Id.

75. Id. at 213 n.8 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)). In Gardner-Denver, the Court distinguished rights which could be waived by contract from an individual's substantive rights which cannot be waived. Gardner-Denver, 415 U.S. at 51. For a discussion of Gardner-Denver, see supra notes 46-57 and accompanying text.

One commentator suggests that Metropolitan Life Insurance v. Massachusetts, 471 U.S. 724 (1985), and Allis-Chalmers read together, mark a shift in emphasis in labor law preemption: The Court's express incorporation of Gardner-Denver and Barrentine [v. Arkansas-Best Freight Sys., 471 U.S. 728 (1981)] [in both Allis-Chalmers and Metropolitan Life] 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. . . . This incorporation promoted] [the Court's vision of a different industrial order in which substantive rights created by states play an increasingly salient role in protecting individual workers . . . .

Herman, supra note 39, at 634. For a discussion of Metropolitan Life, see supra notes 58-64 and accompanying text. However, Metropolitan Life has not been
the analysis must be on whether a state claim confers independent, non-negotiable state law rights or whether evaluation of the claim is "inextricably intertwined" with consideration of the terms of the labor contract.\textsuperscript{76} The Court cautioned that not every state law suit that relates to a provision in a collective bargaining agreement or the parties to such an agreement is preempted by section 301. Rather, "[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."\textsuperscript{77}

III. The Circuit Courts' Analyses

The distinction between state tort and contract actions under collective bargaining agreements complicated the preemption analysis for courts under section 301. Courts had particular difficulty when deciding whether section 301 preempted a state wrongful discharge action or some other state law claim based on the employment relationship.

Historically, the common law rule in the United States was that employment for an unspecified period of time was employment-at-will and was terminable at any time by either party.\textsuperscript{78} Over the years, however, exceptions to the employment-at-will doctrine have been created by federal and state legislatures, as well as by state courts.\textsuperscript{79} Although regular-
tion of the employment relationship is within a state’s traditional police power, actions arising out of the employment relationship implicate federal labor policy when the employment relationship is also governed by a collective bargaining agreement.

This tension, between state law claims and section 301, has caused a split among the circuit courts in deciding the preemptive effect of section 301 in the context of state law wrongful discharge actions or similar claims. The United States Courts of Appeals for the Second and Third Circuits have held that section 301 does not preempt a unionized employee’s state law claim. Conversely, the Seventh, Eighth and Ninth Circuits have held that it does.

A. Section 301—Not Preemptive

The Second and Third Circuits base their decisions that section 301 does not preempt a unionized employee’s state-law wrongful discharge claim on the independence of the claim from the collective bargaining agreement. The Third Circuit concluded that section 301 did not preempt a unionized worker’s state law retaliatory discharge claim in *Her*...
The court of appeals looked to the New Jersey Supreme Court's decision in *Pierce v. Ortho Pharmaceutical Corp.* In *Pierce*, the court recognized a common law exception to employment-at-will. Although the New Jersey court's discussion in *Pierce* seemed to limit the common law action to at-will employees, the Third Circuit concluded that an action for wrongful discharge in retaliation for filing a worker's compensation claim should be available to both at-will employees and those covered by collective bargaining agreements. The court

84. 799 F.2d 120 (3d Cir. 1986). In *Herring*, a diversity suit in federal district court, an employee covered by a collective bargaining agreement with a "just and proper cause" provision for dismissal brought a state tort action for retaliatory discharge after allegedly being dismissed for filing a worker's compensation claim. *Id.* at 121. The state's worker's compensation statute did not create a private cause of action, thus the employee relied on the common law tort action of wrongful discharge in violation of public policy. *Id.* at 122.

The district court predicted that the Supreme Court of New Jersey, if confronted with the question, would hold that § 301 preempts the action because employees covered by a collective bargaining agreement containing "just cause" provisions do not enjoy the common law right of action. *Herring v. Prince Foods-Canning Div.*, 611 F. Supp. 177, 180 (D.N.J. 1985), *rev'd sub nom. Herring v. Prince Macaroni, Inc.*, 799 F.2d 120 (3d Cir. 1986). The district court then held that the action could not continue as a § 301 action because the employee had not exhausted the grievance-arbitration procedures set forth in the collective bargaining agreement. *Id.* at 181-82.

85. 84 N.J. 58, 417 A.2d 505 (1980). In *Pierce*, a medical doctor was discharged for refusing to work on development of a product containing saccharin. *Id.* at 59, 417 A.2d at 507. The doctor alleged that she was entitled to damages for her discharge because she was fired for refusing to follow a course of action which was contrary to the Hippocratic oath, her own ethical standards and federal and state laws governing public health and well-being. *Id.*

86. *Id.* at 67, 417 A.2d at 509 (1980). The *Pierce* court surveyed other state's common-law exceptions to the employment-at-will doctrine and held that wrongfully discharged employees have a common law cause of action in contract and tort where they are discharged in violation of a clear mandate of public policy. *Id.* at 67-68, 417 A.2d at 509.

The district court found *Herring* distinguishable from *Pierce* because the employee in *Herring* was covered by a collective bargaining agreement containing a "just cause" provision. *Herring*, 611 F. Supp. at 179. The district court looked to the decision in *Pierce* and stated: "The decision is predicated, it seems, on the absence of any other remedies for this class of employees and the realization that, in limited circumstances there must be limits to an employer's authority over its employees." *Id.* (emphasis in original). Since the employees covered by a collective bargaining agreement could rely on a contractual remedy based on the agreement, the district court predicted that the New Jersey Supreme Court would not extend the *Pierce* cause of action to such an employee. *Id.* at 180.

87. *Pierce*, 84 N.J. at 68, 417 A.2d at 509.

88. *Herring*, 799 F.2d at 123. The court pointed to another New Jersey decision cited in *Pierce* which did not differentiate between at-will and contractual employees and stated that it is "well established that an employee has a cause of action where he is discharged in retaliation for filing a worker's compensation claim, even if the worker's compensation statute does not provide such a remedy." *Id.* (quoting *Pierce*, 84 N.J. at 68, 417 A.2d at 510 (citing *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960 (App. Div. 1980), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981))). In affirming *Lally*, the New Jersey Supreme Court
reasoned that the worker's compensation statute is applicable to all employees, and contractual employees as a class should not be limited to remedies under the collective bargaining agreement.\(^8\) The court also noted that worker's compensation rights are rooted in state law, not the collective bargaining agreement.\(^9\) The court distinguished between rights created by state statute, such as those in the case before it, and common law exceptions to employment-at-will, and refused to predict whether employees covered by a collective bargaining agreement would be afforded the common law cause of action created in \textit{Pierce}.\(^9\)

In \textit{Baldracchi v. Pratt & Whitney},\(^9\) the Second Circuit held that section 301 did not preempt a unionized worker's state law retaliatory discharge claim. First, the court stated that the worker's claim was independent of the collective bargaining agreement because the claim did not turn on interpretation of the agreement.\(^9\) In reasoning that the claim was independent the court looked to what both Baldracchi and Pratt & Whitney would have to show at trial, and determined that liability would not be decided by reference to the collective bargaining agreement.\(^9\) Further, the Court asserted that the rights under the state statute could not be waived and, thus, determination of the claim was focused on the importance of statutory objectives in the worker's compensation statute and stated that a "common law action for wrongful discharge in this context will effectuate" these objectives. \textit{Id.} (citing \textit{Lally}, 85 N.J. 668, 428 A.2d 1317).


90. \textit{Id.} at 124 n.2. The court acknowledged the overriding importance of an employee's right to seek worker's compensation claims without fear of dismissal whether or not the employee is covered by a collective bargaining agreement. \textit{Id.} at 123.

91. \textit{Id.} at 124.

92. 814 F.2d 102 (2d Cir. 1987), \textit{cert. denied}, 108 S. Ct. 2819 (1988). The facts in \textit{Baldracchi} are strikingly similar to those in \textit{Herring}. In \textit{Baldracchi}, a unionized employee claimed wrongful discharge under a state statute which prohibits employers from discharging employees for filing a worker's compensation claim. \textit{Id.} at 103. The defendant employer removed the action to federal district court under § 301 of the LMRA. \textit{Id.} at 104. Baldracchi, the employee, moved to remand the case for lack of subject matter jurisdiction. \textit{Id.} The district court held the employee's action preempted by § 301 and dismissed the action for failure to state a claim because Baldracchi did not first exhaust the grievance-arbitration procedures in the collective bargaining agreement. \textit{Id.}

93. \textit{Id.} at 105-06.

94. \textit{Id.} at 105. "At trial, Baldracchi would have to present a prima facie case that she was in fact fired for filing a workers' compensation claim." \textit{Id.} (citing 2A A. \textit{LARSON}, \textit{THE LAW OF WORKMEN'S COMPENSATION} § 68.36(c) (1986)). Pratt & Whitney would have to demonstrate that the discharge was for another legitimate reason. \textit{Id.} Pratt & Whitney argued that in determining whether the discharge was for a legitimate reason the court would have to interpret the "just cause" provision in the collective bargaining agreement. \textit{Id.} The court disagreed, noting that although Pratt & Whitney would have to show that the reason was "more than a pretext," it would not have to show that this reason amounted to "just cause" under the collective bargaining agreement. \textit{Id.}
not dependent on the collective bargaining agreement.\textsuperscript{95} The court pointed to other reasons why section 301 did not pre-empt the state tort action. The court acknowledged that the determination of the relief to which Baldracchi might be entitled, if she prevailed, might involve examination of the collective bargaining agreement.\textsuperscript{96} However, the court found this dependence on the agreement not so "substantial" as to mandate preemption under section 301.\textsuperscript{97} The court also noted that preemption of the state action would not further NLRA policy because it would result in less protection for employees covered by collective bargaining agreements.\textsuperscript{98}

\textbf{B. Section 301—Preemptive}

The Seventh, Eighth and Ninth Circuits have reached a contrary result and have held that section 301 does preempt state law claims. The courts have reasoned that the state claims were substantially dependent on the collective bargaining agreement and thus were preempted.

Illustrative of this reasoning is the Eighth Circuit's decision in \textit{Johnson v. Hussman Corp.}\textsuperscript{99} In \textit{Johnson}, the court held that section 301 pre-

\begin{itemize}
\item \textsuperscript{95} \textit{Id}. The court noted that the Supreme Court had previously stated that § 301 does not grant the parties to a collective bargaining agreement the power to contract for something that is illegal under state law. \textit{Id} (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985)). Thus, even if the collective bargaining agreement had allowed Pratt & Whitney the ability to discharge an employee for filing a worker's compensation claim, such a provision would have not affected Baldracchi's claim under the statute. \textit{Id}. "Thus it is difficult to see how determination of that claim can be said to depend on the collective bargaining agreement." \textit{Id}. The court also compared the statute in \textit{Baldracchi} to the federal statute in \textit{Alexander v. Gardner-Denver Co.}, 415 U.S. 36 (1974), as involving unwaivable rights. For a discussion of \textit{Gardner-Denver}, see supra notes 46-57 and accompanying text.
\item \textsuperscript{96} \textit{Baldracchi}, 814 F.2d at 106.
\item \textsuperscript{97} \textit{Id}.
\item \textsuperscript{98} \textit{Id. at} 107 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)). For a discussion of \textit{Metropolitan Life}, see supra notes 58-68 and accompanying text.
\item \textsuperscript{99} 805 F.2d 795 (8th Cir. 1986). In \textit{Johnson}, the employee was injured on the job and, shortly thereafter, discharged for allegedly repeatedly violating posted safety rules. \textit{Id}. at 796. The employee was covered by a collective bargaining agreement which prohibited discharge except for just cause and established grievance-arbitration procedures. \textit{Id}. The employee's union filed a grievance protesting his discharge. \textit{Id}. At the third phase of the grievance procedure the employer denied the grievance, and the union decided not to take it to arbitration. \textit{Id}. The employee then filed an action in state court against the union and the employer alleging conspiracy, breach of the collective bargaining agreement by the employer and breach of the duty of fair representation by the union. \textit{Id}. The employer and the union removed the action to federal district court. \textit{Id}. The employee amended his complaint alleging only that the employer had fired him in retaliation for filing a worker's compensation claim. \textit{Id}. The employer then filed a motion for summary judgment or dismissal. \textit{Id}. The district court treated the state law claim as a § 301 claim and dismissed the claim as time-barred by the six-month statute of limitations. \textit{Id}. For a case holding
empted a unionized worker's state law claim for retaliatory discharge for filing a worker's compensation claim. The court reasoned that the retaliatory discharge claim was really a claim for wrongful discharge in violation of the collective bargaining agreement. Thus, the court found the claim preempted because resolution of the retaliatory discharge claim was "substantially dependent" upon analysis of the collective bargaining agreement.

Similarly, in Ogelsby v. RCA Corp., the Court of Appeals for the Seventh Circuit held that section 301 preempted a unionized worker's state law claims. In Ogelsby, the court stated that the "plaintiff has simply alleged a cause of action for wrongful discharge and if shown to be in violation of a collective bargaining agreement subject to Section 301... then] the action arises under federal law [and the state law is preempted]." The court reasoned that once the district court ascertained that the statute of limitations for § 301 claims is six months, see DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

For a discussion of Ogelsby, see supra notes 71-77 and accompanying text. In Ogelsby, the employee filed a three-count complaint in which he alleged that his employer discharged him for refusing to perform a task in violation of the Occupational Safety and Health Act, which required certain tools and clothing for the assigned task. Id. at 274. The employee filed in state court, and the case was removed to federal district court by RCA. Id. The employee was covered by a collective bargaining agreement with a "just cause" provision. Id. The district court held that the action was a § 301 action which was barred by the six-month statute of limitations. Id. at 275-76. The district court did not discuss the exhaustion requirement as enunciated in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1966). For a discussion of Maddox and this requirement, see supra notes 37-42 and accompanying text.

The court stated that "when the pre-emptive effect of federal legislation is so complete as to exclude from application all state law on the subject, a case is removable [from state to federal court] regardless of the manner in which it was alleged in the state court." Id. However, the court noted: "Where the right sought to be vindicated in a state court is based on a claim rooted in state policy which in no way conflicts with federal labor law policy the action is not removable." Id. at 276 n.3 (citing Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984) (employee discharged for not delivering contaminated milk stated state public policy tort action which was not removable and, thus, not preempted)). For a further discussion of removal, see Caterpillar Inc. v. Williams, 482 U.S. 386 (1987). In Caterpillar the Court stated:

"It is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption... [However,] on occasion, the Court has concluded that the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."

tained that the employee was a member of a union covered by a collective bargaining agreement and the employer’s business was interstate in nature, it “followed ineluctably” that the employee’s claim arose under section 301. The Seventh Circuit similarly held a unionized worker’s state law claim preempted in *Vantine v. Elkhart Brass Manufacturing Co.* In *Vantine*, the court stated that the Indiana Supreme Court had created the tort action for retaliatory discharge for filing a worker’s compensation claim only for at-will employees. The court stated that an employee covered by a collective bargaining agreement did not need this protection because the goals and policies of the Indiana Workers’ Compensation Act were protected by the collective bargaining agreement. The court pointed to the applicable statute which specifically stated: “No contract . . . shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by [the worker’s compensation act].” The collective bargaining agreement must com-

105. *Ogelsby*, 752 F.2d at 278. Having concluded that this was a § 301 claim, the court held that removal to the federal court was proper and the claim was preempted.

106. 762 F.2d 511 (7th Cir. 1985). *Vantine*, an employee of Elkhart Brass, was a member of a union covered by a collective bargaining agreement which contained a “just and proper cause” standard for employee dismissal and also contained a grievance procedure which was to be the “sole method of settling disputes.” *Id.* at 514. Vantine suffered permanent injury while performing his job and filed a worker’s compensation claim. Elkhart Brass placed Vantine on layoff status, which interfered with his seniority rights, and eventually terminated him. *Id.* at 514-15. Vantine’s union, alleging a violation of the collective bargaining agreement, filed and processed a grievance through the first three steps of the grievance procedure. *Id.* at 515. The union subsequently submitted the grievance to arbitration when the grievance remained unresolved. *Id.* The arbitrator issued an award for Elkhart Brass. *Id.* Vantine then filed suit in state court alleging retaliatory discharge, tortious interference with Vantine’s contract rights and breach of contract. *Id.* at 515-16. Elkhart Brass successfully removed the case to federal district court on the basis that the claim was governed by § 301. *Id.* at 516. The district court judge dismissed the case against Elkhart Brass for failing to state a breach of the collective bargaining agreement under § 301. *Id.* On appeal, the plaintiff alleged that federal courts had no jurisdiction over the claim. *Id.*

107. *Id.* at 517.

108. *Id.* The court stated that an employee covered by a collective bargaining agreement would be protected from a retaliatory discharge because “the termination of an employee in retaliation for filing a workmen’s compensation claim would not be considered for ‘just cause.’ ” *Id.*

109. *Id.* (quoting Ind. Code § 22-3-2-15 (1971)). The court further cited another Indiana statute which stated that “[e]very contract of service between any employer and employee covered by [the Worker’s Compensation Act] . . . shall be presumed to have been made subject to the provisions of this act . . . .” *Id.* (quoting Ind. Code § 22-3-2-4 (1971)). The court stated, “Under Indiana law, a collective bargaining agreement, which as a contract must comply with [these two statutes], cannot operate to relieve the employer of its duty to compensate employer for work-related injuries . . . by allowing the employer to discharge an employee for filing workmen’s compensation claims.” *Id.* (citation omitted).
ply with the statute, thus, the court concluded that the agreement would adequately protect the employee's right not to be discharged in retaliation for filing a worker's compensation claim. The court stated that an employee covered by a collective bargaining agreement may instead pursue a contract remedy which allows the employee to "exercise his right to workmen's compensation in an unfettered fashion without being subject to reprisal."

The Court of Appeals for the Ninth Circuit held that section 301 preempted a unionized employee's state wrongful discharge action in *DeSoto v. Yellow Freight Systems Inc.* In *DeSoto*, the employee had been discharged for refusing to do something he mistakenly believed was illegal. The employee had gone through the grievance procedure specified in the collective bargaining agreement and his discharge was sustained. The court acknowledged that "it [is] possible to say that [DeSoto's wrongful discharge claim] is distinct from any claim based on the collective bargaining agreement." Nevertheless, the court stated that permitting this state action may eviscerate a central tenet of federal contract law by facilitating "an end run around the grievance procedure." The Ninth Circuit also held that section 301 preempted state claims for fraud and negligent misrepresentation in *Bale v. General Telephone Co.* There, the court reasoned that the employees' state claims

110. Id.
111. Id.
113. Id. at 1435-36. The court noted that DeSoto was mistaken in his belief that the act was illegal and, therefore, "[h]e was not acting in defense of a public policy of the state... but incorrectly asserting his own interpretation of the law." Id. at 1438.
114. Id. at 1436.
115. Id. at 1437.
116. Id. (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)). Further, the court stated: "It is just this kind of dispute over what is the appropriate management response to difficult behavior by an employee that should be the subject of a grievance procedure... Harmonious relations between management and labor depend on the grievance procedure being final in this kind of dispute." Id. at 1438.
117. 795 F.2d 775 (9th Cir. 1986). In *Bale*, two employees alleged that at the time of hiring they were told they would be "temporary" employees for six months and then become "regular" employees. Id. at 777. The employees alleged that they believed that the rights and privileges of regular employment would vest automatically at the end of six months. Id. After the six-month period passed, one of the employees asked the union to file a grievance on her behalf to gain recognition of her regular status. Id. The union refused, and the employees were discharged more than a year after their hiring. Id. The employees filed a claim against General Telephone in state court alleging breach of oral contract, fraud, negligent misrepresentation and a § 301 claim for breach of the collective bargaining agreement; they also brought suit against the union. Id. General Telephone removed the case to federal district court where the court granted General Telephone's and the union's summary judgment motions. Id. at 777-78. Plaintiff moved to amend the judgment for General Telephone, ask-
would require interpretation of the collective bargaining agreement because to prove their claims they would have to show that the terms of the agreement differed from the individual contracts they believed they had made.  

Citing Allis-Chalmers, the court stated that the preemptive effect of section 301 encompasses not only contract claims, but tort claims that would frustrate the purposes of section 301. The court stated that the plaintiffs stated tort actions “arose out of the same acts and conduct which formed the basis of their section 301 claim” and were thus preempted by section 301.

C. The Resolution?

The Supreme Court granted certiorari in Lingle v. Norge Division of Magic Chef, Inc. to resolve the conflict among the circuits. The Lingle Court reversed the Seventh Circuit and held that section 301 of the LMRA preempted the application of state law only if such application required the interpretation of a collective bargaining agreement.

In Lingle, Jonna Lingle was injured in the course of her employment at a manufacturing plant in Illinois. Lingle filed for benefits pursuant to the Illinois Workers’ Compensation Act to pay the medical expenses which resulted from her injuries. Shortly thereafter, Lingle’s employer fired her for filing a “false worker’s compensation claim.” The union representing Lingle filed a grievance pursuant to the collective bargaining agreement which protected employees from discharge except for “just cause.” Ultimately, an arbitrator ruled in Lingle’s favor and ordered her reinstated with full back pay. Meanwhile, Lingle had

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118. Id. at 780.
119. Id. (citing Allis-Chalmers, 471 U.S. at 211).
120. Id. (citing Carter v. Smith Food King, 765 F.2d 916, 921 (9th Cir. 1985)). For another case in which the Ninth Circuit held a unionized employee’s state law contract and tort actions preempted by § 301, see Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1989) (state law contract, wrongful discharge, wrongful discharge in violation of public policy and intentional infliction of emotional distress claims preempted by § 301 because all claims actually suits based on violations of collective bargaining agreement).
122. Id. at 1879-80. For a discussion of the differing views among the circuits, see supra notes 84-120 and accompanying text.
123. Lingle, 108 S. Ct. at 1885.
124. Id. at 1879.
125. Id.
126. Id.
127. Id. The collective bargaining agreement established a procedure for arbitration of grievances which the parties followed. Id.
128. Id.
also filed suit in state court alleging that she had been discharged for exercising her rights under the state worker’s compensation laws.\textsuperscript{129} The employer, Magic Chef, removed the case to federal district court on the basis of diversity of citizenship, and requested that the court either dismiss the case since it was preempted by section 301 or stay the case pending completion of the arbitration.\textsuperscript{130}

The district court, relying on \textit{Allis-Chalmers}, concluded that the "claim for retaliatory discharge is 'inextricably intertwined' with the collective bargaining provision prohibiting wrongful discharge or discharge without just cause."\textsuperscript{131} Thus, the district court granted Magic Chef's motion to dismiss the case due to preemption.\textsuperscript{132}

The United States Court of Appeals for the Seventh Circuit affirmed.\textsuperscript{133} The court looked to recent decisions in the Seventh Circuit and concluded that the holdings were consistent, stating: "[C]laims of retaliatory discharge brought by a worker who is covered by a collective bargaining agreement are actually claims for wrongful discharge under the collective bargaining agreement" and are preempted under section 301.\textsuperscript{134} The court stated that the state tort of retaliatory discharge was "inextricably intertwined" with the collective bargaining agreement because "it implicate[d] the same analysis of the facts as would an inquiry under the just cause provisions of the agreement."\textsuperscript{135} The court de-

\begin{itemize}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Lingle v. Norge Div. of Magic Chef}, 618 F. Supp. 1448, 1449 (S.D. Ill. 1985), \textit{aff’d}, 825 F.2d 1031 (7th Cir. 1987), \textit{rev’d}, 108 S. Ct. 1877 (1988). The court stated:
\begin{quote}
It is equally clear that such a tort claim would effect the “legal consequences [which] were intended to flow from breaches of [the] agreement.” The parties have agreed to abide by the orderly mechanism for grievance of wrongful discharge claims as set out in the collective bargaining agreement. Allowing an independent tort action for retaliatory discharge would undermine the mutually agreed upon procedures provided for in that agreement.
\end{quote}
\textit{Id.} (citation omitted).
\item \textsuperscript{132} \textit{Id.} Because the court concluded that the plaintiff’s claim was essentially a § 301 claim, the court dismissed the claim for the plaintiff’s failure to exhaust her administrative remedies as required by Republic Steel Corp. v. Maddox, 379 U.S. 650 (1986). For a further discussion of Maddox, see \textit{supra} notes 37-38 and accompanying text.
\item \textsuperscript{133} \textit{Lingle v. Norge Div. of Magic Chef}, 823 F.2d 1031 (7th Cir. 1987), \textit{rev’d}, 108 S. Ct. 1877 (1988).
\item \textsuperscript{134} \textit{Id.} at 1041. The court thus concluded that its holding was "mandated by prior cases in the[ ] circuit." \textit{Id.} (citing Mitchell v. Pepsi-Cola Bottlers, Inc., 772 F.2d 342 (7th Cir. 1985), \textit{cert. denied}, 475 U.S. 1047 (1986); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985); Ogelsby v. RCA Corp., 752 F.2d 272 (7th Cir. 1985)). For a discussion of \textit{Vantine} and \textit{Ogelsby}, see \textit{supra} notes 103-11 and accompanying text.
\item \textsuperscript{135} \textit{Lingle}, 823 F.2d at 1046. The court stated that the state court “would have to determine if the employee would have been discharged absent the state-law-proscribed motive, which in turn would depend on whether the non-pro-
clined to follow the Second and Third Circuits, and joined the Eighth and Ninth Circuits in holding that the state tort of retaliatory discharge was preempted under section 301.136

The United States Supreme Court reversed the decision of the Seventh Circuit and held that section 301 did not preempt Lingle's claim.137 The Court noted that Illinois courts recognized the tort of retaliatory discharge for filing a worker's compensation claim and had extended this cause of action to employees covered by collective bargaining agreements.138 The Court stated that neither the elements necessary to the retaliatory discharge action nor the employer's defense required a court to interpret any term of a collective bargaining agreement.139 Because the state action required only factual inquiries and did not depend on interpretation of the collective bargaining agreement, the Court asserted that the state action was "independent" for purposes of section 301 preemption.140 The Court stated that even if a

scribed motive constituted 'just cause' under the collective bargaining agreement." Id. 136. Id. at 1047. The court cited Baldracchi v. Pratt & Whitney, 814 F.2d 102 (2d Cir. 1987), cert. denied, 108 S. Ct. 2819 (1988); Johnson v. Hussmann Corp., 805 F.2d 795 (8th Cir. 1986); Herring v. Prince Macaroni, Inc., 799 F.2d 120 (3d Cir. 1986); Bale v. General Tel. Co., 795 F.2d 775 (9th Cir. 1986); Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984). For a discussion of these cases, see supra notes 92-120 and accompanying text. The court also cited a Tenth Circuit case decided prior to Allis-Chalmers which agreed with the decisions of the Second and Third Circuits. Id. (citing Peabody Galion v. A.V. Dollar, 666 F.2d 1309 (10th Cir. 1981) (employee's retaliatory discharge action not preempted)). 137. Lingle, 108 S. Ct. at 1883-85. 138. Id. at 1881-82 (citing Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), cert. denied, 474 U.S. 909 (1985); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978)).

In Midgett, the Illinois Supreme Court relied on the Gardner-Denver line of cases to extend the common law tort of retaliatory discharge for filing a worker's compensation claim to employees covered by collective bargaining agreements. Midgett, 105 Ill. 2d at 148, 473 N.E.2d at 1284 (citing Alexander v. Gardner-Denver, 415 U.S. 36 (1974)). The dissent in Midgett stated that the tort was created to provide protection for at will employees only because a unionized employee has protection from retaliatory discharge in the just cause provision. Id. at 152, 473 N.E.2d at 1286 (Moran, J., dissenting). Further, the dissent argued that allowing union employees the benefit of this tort will undermine the federal labor policy of arbitration as the preferred method of dispute resolution. Id. (Moran, J., dissenting).

139. Lingle, 108 S. Ct. at 1882. The Court stated:
[T]o show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights. Id. (quoting Horton v. Miller Chemical Co., 776 F.2d 1351, 1356 (7th Cir. 1985), cert. denied, 475 U.S. 1122)). The employer then must show a nonretaliatory reason for the discharge. Id.
140. Id.
court must perform the same analysis of the same facts under both the state claim and the collective bargaining agreement, section 301 does not mandate preemption unless interpretation of the collective bargaining agreement is required for the resolution of the state claim.\footnote{141}

The Court in \textit{Lingle} stated that its holding was consistent with the policy of "fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements."\footnote{142} The Court, citing \textit{Allis-Chalmers}, emphasized the importance of preserving the effectiveness of arbitration by not allowing an individual to sidestep the available grievance procedures.\footnote{143} Contrary to its holding in \textit{Allis-Chalmers}, the Court stated that the fact that an action is \textit{non-negotiable} or \textit{applicable to all workers} does not ensure its independence from the collective bargaining agreement.\footnote{144} Furthermore the Court stated that its decision clearly left the interpretation of collective bargaining agreements for arbitrators; judges may determine questions of state law involving labor-management relations only if the state questions involve no interpretation of collective bargaining agreements.\footnote{145}

The Court also stated that allowing Lingle's state action was consistent with the policy of allowing "separate fonts of substantive rights to remain unpre-empted by other federal labor-law statutes."\footnote{146} The Court discussed other instances where it recognized that other substantive rights can exist in the labor-relations context without interpretation of collective bargaining agreements. The Court pointed to several of its prior decisions\footnote{147} where the Court held that individual employees are not, because of the availability of arbitration, barred from bringing claims under federal statutes.\footnote{148} The Court stated that the "theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply \textit{where the employee's}
claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." The Court reasoned that these same considerations should also apply where state statutes establish minimum substantive guarantees. The Court pointed to its recent decision in *Fort Halifax Packing Co. v. Coyne* where it held a state statute was not preempted "since its establishment of a minimum labor standard [did] not impermissibly intrude upon the collective-bargaining process." Finally, the Court stated that although contractual protection may provide a remedy for conduct that also violates state law, the existence or contour of the state action is not necessarily dependent upon the terms of the collective bargaining agreement. This is so because even if an arbitrator concludes that an agreement does not prohibit a particular discriminatory or retaliatory discharge, this conclusion may not be consistent with a proper interpretation of state law.

IV. ANALYSIS: TENSION BETWEEN STATE LAW CLAIMS AND FEDERAL LABOR POLICIES UNDERLYING SECTION 301 PREEMPTION

The Supreme Court's decision in *Lingle* did not clarify the *Allis-Chalmers* test for deciding the preemptive effect of section 301 on state law claims. In fact, decisions in the courts of appeals following *Lingle* demonstrate a continued confusion over the parameters of state law claims and section 301 preemption. Further, the result in *Lingle* represents a departure from thirty years of Supreme Court pronouncements regarding policies underlying 301 preemption. *Lingle* frustrates both federal labor policies of uniform interpretation of collective bargaining agreements and arbitration as the preferred method of dispute resolution. However, if *Lingle* is viewed as a narrow extension of the *Gardner-Denver* line of exceptions to the federal labor policies of section 301, the decision is more consistent with Supreme Court precedent.


152. *Lingle*, 108 S. Ct. at 1885 (quoting *Fort Halifax*, 482 U.S. at 7). The Court reemphasized that preemption should not be "lightly inferred" where a state statute provides minimum substantive guarantees, because "the establishment of labor standards falls within the traditional police power of the state." *Id.* (quoting *Fort Halifax*, 482 U.S. at 21).

153. *Id.*

154. *Id.* Thus the Court stated that a "typical" state case of discriminatory or retaliatory discharge could be resolved without interpreting the "just cause" language of a collective bargaining agreement. *Id.*
A. Uniform Interpretation of Collective Bargaining Agreements

One of the underlying policies of section 301 is the promotion of uniform interpretation of labor contracts to ensure smooth negotiation and administration of collective bargaining agreements. By allowing state courts to decide disputes which arise out of the employment relationship, Lingle frustrates this policy in two ways: (1) collective bargaining agreements will, in the first instance, be interpreted by courts, as opposed to arbitrators; and (2) these interpretations will be based on fifty different state law interpretations rather than a uniform body of federal common law.  

State contract and tort law serve the same function in the labor-relations context—to define the legal consequences of the employment relationship. The Supreme Court has consistently held that section 301 mandates that all state contract law give way to federal law in interpreting labor contracts. In Allis-Chalmers, the Court recognized the difficulty in distinguishing between contract and tort law in this context. However, the Allis-Chalmers Court placed substance over form and found that section 301 policies would be promoted only if provisions in collective bargaining agreements are defined by federal law, regardless of whether the action is called a tort or contract claim. After Lingle, state courts will define employment relationships created by collective bargaining agreements so long as the elements necessary to establish the state claim do not require literal interpretation of the terms of the collective bargaining agreement, regardless of the true nature or origin of the claim. Therefore, state courts will be deciding disputes which are covered by provisions in the parties' contract even though the agreement contains mandatory provisions for dispute resolution.

For example, most collective bargaining agreements contain a provision stating that an employer cannot fire an employee without "just cause." If an arbitrator finds a dismissal was without just cause, the
employee generally is entitled to reinstatement with back pay. Following Lingle, state courts will now follow the same decision-making process when resolving state wrongful discharge claims as when interpreting the just cause provisions of collective bargaining agreements. Although it may not be necessary to establish the lack of just cause under the collective bargaining agreement in order to establish the elements of the state tort claim, the same aspect of the employment relationship will be defined by state courts—whether the employee was “wrongfully” discharged or discharged “without cause.”

Thus, employees covered by a collective bargaining agreement containing a just cause provision may relabel their contract claims as state tort claims and have an opportunity for additional damages not provided in the collective bargaining agreement. This consequence conflicts with the Allis-Chalmers Court’s statement that section 301 preempts interpretation of terms of the agreement and the “legal consequences . . . intended to flow from breaches of that agreement.” If states allow additional remedies for violation of rights protected under the collective bargaining agreement, they will have redefined the legal consequences for

162. Id. at 146.
163. “Most wrongful discharge actions involve some variant of a claim that the discharge was not for 'just cause.'” Wheeler & Browne, Federal Preemption of State Wrongful Discharge Actions, 8 INDUS. REL. L.J. 1, 2 (1986). The arbitration process and wrongful discharge actions contain the same basic decision-making process. See Kinyon & Rohlik, supra note 157, at 8. The only major differences between the decision-making processes in state wrongful discharge actions and in arbitration hearings are the informality of the arbitration hearings and lack of rules of evidence. Id. Additionally, although there could be a different test in law and in arbitration, this distinction is artificial because there is no uniformity in the test applied in law. Id. at 9. Wrongful discharge claims are “conceptually disputes arising from employment relationships covered by the collective bargaining agreement and . . . the arbitration clause in the agreement.” Id. at 5.

164. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). In Allis-Chalmers the Court stated:

Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator’s role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract.

Id. at 219-20 (emphasis added).

165. Id. at 211. The Court fully stated:

The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. 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. . . .

Id.
breaches of provisions of the collective bargaining agreement.\textsuperscript{166}

B. Promote and Protect the Arbitration Process

In order to maintain orderly and peaceful settlements, section 301 seeks to promote and protect collectively-bargained grievance arbitration procedures.\textsuperscript{167} The Supreme Court has attempted to foster this policy in several ways, including requiring exhaustion of bargained-for grievance procedures before making a claim under section 301,\textsuperscript{168} and promoting finality of the arbitrator’s decision.\textsuperscript{169} \textit{Lingle} frustrates the federal labor policy preference for arbitration by not requiring exhaustion of the agreed-upon grievance-arbitration procedures before bringing a state tort action.\textsuperscript{170} This result is entirely inconsistent with the Court’s statement in \textit{Republic Steel Corp. v. Maddox}.\textsuperscript{171} In \textit{Maddox}, the Court stated that a rule permitting an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate the policy that it is the arbitrator, and not the court, who has the responsibility to interpret the labor contract in the first instance.\textsuperscript{172} The \textit{Maddox} Court explained that to excuse an employee from exhausting the procedures available under a collective bargaining agreement would have the effect of deterring the employer from entering into arbitration clauses when negotiating future agreements.\textsuperscript{173} To the extent that \textit{Lingle} gives individual employees independent access to courts, the incentive to arbitrate and negotiate diminishes.\textsuperscript{174}

\begin{itemize}
\item \textsuperscript{166} See Comment, \textit{NLRA Preemption of State Wrongful Discharge Claims}, 34 Hastings L.J. 635, 639 n.21 (1983) (“If a state permits imposition of punitive damages, and the bargaining agreement provides only for equitable remedies, then a decision that the state law is not preempted will cause a deviation from the terms of the bargaining agreement.”).
\item \textsuperscript{167} For a further discussion of the promotion and protection of collectively-bargained arbitration procedures, see supra notes 36-42 and accompanying text.
\item \textsuperscript{168} For a further discussion of exhaustion of grievance procedures, see supra notes 36-42 and accompanying text.
\item \textsuperscript{169} For a further discussion of the finality of arbitration, see supra notes 36-68 and accompanying text.
\item \textsuperscript{170} \textit{Lingle}, 108 S. Ct. at 1884.
\item \textsuperscript{171} 379 U.S. 650, 652-53 (1965). For a discussion of \textit{Maddox}, see supra notes 37-38 and accompanying text.
\item \textsuperscript{172} \textit{Maddox}, 379 U.S. at 652-53.
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.} Where an employee has the state law protections and a forum for adjudication, the protections offered by unions become less important. Further, the employer has less incentive to negotiate arbitration procedures because these procedures will nonetheless be non-exclusive. \textit{Cf. Gould, Hay & Rosenfeld, When State and Federal Laws Collide: Preemption—Nightmare or Opportunity?}, 9 Indus. Rel. L.J. 1, 10 (1987) (studies done in wake of Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), on use of arbitration indicate that unions and employers have become \textit{more} interested in resolving disputes through agreed upon procedures now that another forum exists).}

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The Maddox Court further stated that the employer and the union should not be deprived of the ability to establish a uniform and exclusive method for the orderly settlement of employee grievances. Lingle frustrates this policy by making the grievance procedures established in the collective bargaining agreement non-exclusive, thus depriving these procedures of much of their utility and effectiveness. In addition, grievance procedures are generally more expeditious and less costly than civil litigation. These benefits will mean little if unionized employees are allowed to resort to civil litigation in the first instance to settle their disputes.

Lingle further frustrates the policy favoring arbitration as the preferred method of dispute resolution by not giving effect to arbitration awards. This directly conflicts with the Supreme Court's decisions in the Steelworker's Trilogy in which the Court stated that courts should not review arbitration awards so long as the award draws its essence from the collective bargaining agreement. The congressional policy of favoring arbitration as the preferred method of dispute resolution will only be furthered if parties to a collective bargaining agreement can rely on the finality of the award.

Arguably, in order to allow unionized employees the benefit of state law protections yet not cause arbitration to lose effectiveness, states could require employees to exhaust the remedies under the collective bargaining agreement and, if successful, bring an action in state court in order to have the benefit of punitive and consequential damages available under tort actions. In this way, states would be able to not only provide all employees the protections it creates, but also promote and protect the arbitration process.

However, arguably, not allowing employees covered by collective bargaining agreements the opportunity to bring state law claims and, potentially, collect punitive damages is a trade-off for the benefits and protections provided by the agreement. For a discussion of union benefits, see Herman, supra note 39, at 601 n.18 (benefit unions offer is an end to discriminatory and arbitrary treatment, improved working conditions, protection against unjust termination and participation in workplace decision-making); Perritt, Wrongful Dismissal Legislation, 35 UCLA L. Rev. 65, 69 (1987) (one benefit of unionization is protection from arbitrary dismissal; accordingly, trade union groups are ambivalent toward proposed wrongful discharge statutes).

Lingle, 108 S. Ct. at 1884. The Lingle Court stated that judges can determine questions of state law if the questions do not require construing the collective bargaining agreement. Id. Further, the Court stated that an arbitrator's decision on a particular question may or may not be consistent with the proper interpretation of state law. Id. at 1885. Therefore, the arbitrator's award is not a bar to a subsequent state law action.


Finality of the award depends on other forums giving res judicata effect to arbitration awards. For the doctrine of res judicata to apply in arbitration proceedings, there must be (1) a final decision on the merits in a prior proceed-
C. Extension of Exceptions to Section 301 Policy

If Lingle is read as extending the Gardner-Denver line of exceptions to the federal policy of promoting and protecting the arbitration process, as opposed to clarifying section 301 preemption of state actions, then the decision is more consistent with the policies underlying section 301.181 Factually, Lingle is more analogous to Gardner-Denver than Allis-Chalmers. In Lingle, the state claim was based on a statute,182 whereas in Allis-Chalmers the state claim was a common law tort action.183 The workers' compensation statute in Lingle can be seen as a statute which gives minimum substantive protection of workers, like the federal antidiscrimination statute in Gardner-Denver.184

Section 301 does not explicitly prohibit state regulation of labor relations or the establishment of minimum labor standards.185 In fact, the Lingle Court stated that its recent holding in Fort Halifax Packing Co. v. Coyne186 extended the Gardner-Denver reasoning to state statutes establishing minimum labor standards as rights independent of the collective bargaining agreement.187 Thus, it can be argued that Lingle does not set forth a definitive test for deciding when section 301 preempts a state law claim; rather, Allis-Chalmers still controls this question. Instead, Lingle can be viewed as an exception to the usual Allis-Chalmers analysis due to

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183. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 206 (1985). The action in Allis-Chalmers was based on the Wisconsin tort of bad-faith handling of an insurance claim. Id.

184. See Kinyon & Rohlik, supra note 157, at 45 (state actions for retaliatory discharge for filing workers' compensation claims parallels kind of individual statutory right found in Gardner-Denver).

185. For the text of § 301, see supra note 9 and accompanying text.


187. Lingle, 108 S. Ct. at 1885 (citing Fort Halifax, 482 U.S. at 7).
the statutory source of right under which the plaintiff brought her claim.\textsuperscript{188} If \textit{Lingle} is viewed in this way, as an exception following the \textit{Gardner-Denver} line of exceptions, then the \textit{Lingle} Court's statement that preclusive effect need not be given to arbitration awards is consistent with Supreme Court precedent.

1. Exhaustion of Grievance-Arbitration Not Required

The \textit{Lingle} Court's suggestion that preclusive effect not be given to adverse arbitration awards is consistent with the policies behind the \textit{Gardner-Denver} exception.\textsuperscript{189} The theory common to the \textit{Gardner-Denver} line of cases was "that notwithstanding the strong policies encouraging arbitration, '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.'"\textsuperscript{190} These different considerations include: (1) that federal and state minimum substantive guarantees are intended to supplement existing institutions relating to employment;\textsuperscript{191} (2) arbitral processes are not appropriate forums for these rights;\textsuperscript{192} and (3) preemption should be lightly inferred in these cases because establishment of minimum substantive guarantees falls within the states' traditional police power.\textsuperscript{193}

However, although the state action in \textit{Lingle} could be viewed as stemming from a statute providing minimum substantive guarantees, none of the considerations underlying the exception to arbitration as the preferred method of dispute resolution are present. First, the right in \textit{Lingle}—to be free from discharge in retaliation for filing a workers' compensation claim—is not supplementary to the existing institutions (here the collective bargaining agreement) relating to employment. Rather,

\textsuperscript{188} Some commentators have suggested that the source of the cause of action should play a determinative role in § 301 preemption. See Wheeler & Browne, \textit{supra} note 163, at 36 (in order to find no preemption, a directly controlling statute or constitutional provision should be identified to justify finding significant state interest to override federal interest in promoting arbitration). \textit{But see} Herman, \textit{supra} note 39, at 636-37 (whether action based on statute or on decisional law is irrelevant in preemption analysis).


\textsuperscript{190} \textit{Id.} (quoting \textit{Atchison, Topeka & Santa Fe Ry. Co. v. Buell}, 480 U.S. 557 (1987) (quoting \textit{Barrentine v. Arkansas-Best Freight Sys.}, 450 U.S. 728 (1981))). Some commentators have argued that \textit{Gardner-Denver} and its progeny are distinguishable from and, therefore, inapplicable to instances where state law is at issue because the Court was interpreting and harmonizing two federal statutes. \textit{See, e.g., Kinyon & Rohlik, \textit{supra} note 157, at 40-44. \textit{But see} Herman, \textit{supra} note 39, at 615-16 ("independent, nonwaivable rights analysis is apposite to claims irrespective of whether based on federal or state law").

\textsuperscript{191} \textit{Gardner-Denver}, 415 U.S. at 52.

\textsuperscript{192} \textit{Id.} at 58.

\textsuperscript{193} \textit{Fort Halifax}, 482 U.S. at 7.
this guarantee of freedom from retaliatory discharge is subsumed in the just cause provision of the collective bargaining agreement. An employee covered by a collective bargaining agreement already enjoys protection from retaliatory discharge because discharge for filing a workers' compensation claim is not "just cause." Second, the use of an arbitral forum to resolve the dispute is particularly appropriate in this type of action. Both parties in cases such as Lingle will have agreed to be bound by a collective bargaining agreement which requires the resolution of discharge claims through established grievance-arbitration procedures.

Further, the arbitrator is not required to interpret federal or state law but, rather, is only required to make a determination as to whether the employee was fired in retaliation for filing the workers' compensation claim. This is a fact-sensitive inquiry and, as such, does not involve determination of matters outside the realm of an arbitrator's expertise.

Finally, although establishing minimum labor standards is within the state's traditional police power, the federal labor policies underlying section 301 preemption should outweigh the state's interest in these cases because (1) employees covered by collective bargaining agreements with "just cause" provisions do not need state protection against wrongful discharge; (2) allowing unionized employees to bring state actions would undermine the federal labor policies of section 301; and (3) the retaliatory discharge tort in Lingle is not a minimum labor standard as envisioned in Fort Halifax or Metropolitan Life Insurance Co. v. Massachusetts.

In Metropolitan Life, the state statute required minimum labor standards to be established by the state. The concept of retaliatory discharge is subsumed within the just cause provision and is within the power of the arbitrator to consider when determining if a discharge is for just cause.

Professor Perritt suggests that a grievance which may be resolved by arbitration may involve disputes over the application of contract language or it may involve contractual limitations on disciplinary action against an employee. Id. at 127. Grievance and arbitration procedures guarantee that contractual provisions will be enforced without resort to the use of ordinary courts. Id. at 128. Employers favor arbitration provisions because they permit peaceful resolution of disputes without strikes. Id.

Some commentators argue that wrongful discharge actions pose a significant threat of disruption to collectively-bargained grievance and arbitration procedures and that insufficient weight has been given to the principles underlying § 301 preemption. Under this view, all wrongful discharge actions would be preempted except where the state has expressly made a right independent of the collective agreement non-negotiable. Id. at 23, 44.

In Metropolitan Life, the Court stated: 'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.'
mental health care benefits be provided to employees, and in *Fort Halifax* the statute dealt with one-time severance pay for employees in the event of a plant closing. In both cases, the Court stated that the NLRA is concerned with the process for determining terms and conditions of employment and not with the substantive terms of the collective bargaining agreement. However, the Court stated that if state statutes frustrate the legislative goals of the NLRA, they should be preempted. The tort action in *Lingle* is not a state minimum labor standard because it does not define a substantive term of the agreement like those in *Metropolitan Life* or *Fort Halifax*. Rather, the availability of a tort action simply provides an additional forum and remedy for a discharge without "just cause." The policies of section 301 and the NLRA are frustrated when agreed-upon provisions for dispute resolution are not the exclusive remedy for conduct covered by the agreement.

2. Rejection of Waiver of Employee's Right

The Court addressed the question of waiver in *Gardner-Denver* and stated that although a union is able to waive certain statutory rights which are related to collective activity, a party to a collective bargaining agreement can not waive an individual's substantive right. *Lingle* involved a statute which expressly prohibited the waiver of rights under the workers' compensation scheme in Illinois. Consequently the Court did not address whether, absent such statutory language, waiver of such rights is something that may be negotiated at the bargaining table. If waiver is allowed, then the state cause of action does not, by definition, fall into the *Gardner-Denver* line of exceptions which applies

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199. For a discussion of *Metropolitan Life* and *Fort Halifax*, see supra notes 58-68 and accompanying text.

200. See *Fort Halifax*, 482 U.S. at 20 (citation omitted); *Metropolitan Life*, 471 U.S. at 754-55.

201. Id. 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 between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.


204. Another unanswered question after *Lingle* is as follows: After parties to a collective bargaining agreement agree to a waiver of state law claims and a covered employee files an action in state court for wrongful discharge, will the state bar to the waiver of the state law claim be preempted? The Court in *Lingle* stated that before deciding whether a state law bar to waiver could be pre-
only to individual, nonwaivable rights.\textsuperscript{205}

V. \textit{After Lingle}

State and federal courts will continue to have difficulty determining whether state law claims are preempted under section 301. The test set out in \textit{Lingle} does not clarify the parameters between state law claims and preemption under section 301. Therefore, courts are likely to continue deciding the preemption issue on an ad hoc basis.

The continued confusion is illustrated in the cases decided since \textit{Lingle}.\textsuperscript{206} Generally, the courts of appeals have viewed \textit{Lingle} as another statement of the \textit{Allis-Chalmers} test for determining which state law claims are independent of the collective bargaining agreement and, thus, not preempted. The courts have viewed "independent" state law claims as ones that do not require interpretation of the collective bargaining agreement for their resolution and are not "inextricably intertwined" with the collective bargaining agreement.

However, some courts are also continuing to use the "nonnegotiable" language from \textit{Allis-Chalmers} in their preemption analyses even though the Court in \textit{Lingle} explicitly stated that a determination that state rights are nonnegotiable is not dispositive under section 301 preemption analysis.\textsuperscript{207} This two-step inquiry asks: (1) whether the state action is "independent" of the collective bargaining agreement; and (2) whether the state right is one which is nonnegotiable. This inquiry is consistent with the view that \textit{Lingle} is a narrow exception—within the \textit{Gardner-Denver} line of exceptions—to the \textit{Allis-Chalmers} test. Viewed this way, section 301 only has a preemptive effect where the state law claim is dependent upon the collective bargaining agreement for its resolution unless the state action provides the employee with a nonnegotiable right.

A. \textit{Lingle As An Extension of the "Independent" Test}

Those courts which view \textit{Lingle} as an extension of the \textit{Allis-Chalmers} test would be required. \textit{Id.}

\textsuperscript{205} \textit{Gardner-Denver}, 415 U.S. at 52.

\textsuperscript{206} For a discussion of decisions since \textit{Lingle}, see infra notes 206-42 and accompanying text. See also \textit{Merchant v. American Steamship Co.}, 860 F.2d 204 (6th Cir. 1988) (section 301 did not preempt seaman's retaliatory discharge claim under admiralty law and therefore exhaustion of remedies under the collective bargaining agreement not required); \textit{Utility Workers of America v. Southern California Edison Co.}, 852 F.2d 1083 (9th Cir. 1988) (section 301 preempts union's claim that by unilaterally implementing drug-testing program employer violated rights guaranteed by California constitution); \textit{Law v. Calmat}, 852 F.2d 430 (9th Cir. 1988) (section 301 preempts employee's claim seeking declaratory and injunctive relief after employer imposed mandatory drug-testing program); \textit{Hyles v. Mensing}, 849 F.2d 1213 (9th Cir. 1988) (section 301 preempts employee's emotional distress claim).

\textsuperscript{207} \textit{See Lingle}, 108 S. Ct. at 1882 n.7.
test for determining which state law claims are "independent" of the collective bargaining agreement and, thus, not preempted have reached contrary results, depending upon how the court views the elements necessary to the particular claim. The Ninth Circuit held a unionized employee's actions for breach of implied covenant of good faith and fair dealing and intentional infliction of emotional distress preempted in Newberry v. Pacific Racing Association.208 The court looked to Lingle and Allis-Chalmers and stated that both decisions "sent the same message" and, therefore, proceeded to analyze Newberry's claims under "the Supreme Court's twin tests."209 The Ninth Circuit reasoned that the breach of the implied covenant of good faith and fair dealing was preempted because the state claim "require[d] . . . interpretation of a collective bargaining agreement" or "is substantially dependent upon analysis" of the terms of the agreement.210 The Court also held that section 301 preempted the plaintiff's intentional infliction of emotional distress claim because the "determination of the validity of her emotional distress claim will require us to decide whether her discharge was justified under the terms of the collective bargaining agreement."211

Conversely the Court of Appeals for the Sixth Circuit recently held that section 301 did not preempt state actions for discrimination under the state handicap discrimination statute and retaliatory discharge in Smolarek v. Chrysler Corp.212 The court looked to Allis-Chalmers and Lingle.

208. 854 F.2d 1142 (9th Cir. 1988). Newberry was employed at Golden Gate Fields Race Course where the defendant, Pacific Racing Association, conducted racing during the year. Id. at 1144-45. Newberry was discharged after Pacific conducted an investigation and alleged that Newberry had been misappropriating funds. Id. at 1145. Newberry filed a grievance pursuant to procedures set out in the agreement between Pacific and Newberry's union. Id. The grievance proceeded to arbitration and the arbitrator found that Pacific did not have the requisite "just cause" to fire Newberry and awarded her reinstatement, but not back pay. Id. The district court found Newberry's claims preempted by § 301 and granted summary judgment for the defendant. Id. at 1144.

209. Id. at 1146. The court suggested that the two tests do not differ and stated the tests as: "Does the application of state law 'require[ ] the interpretation of a collective-bargaining agreement,' Lingle, 108 S. Ct. at 1885, or 'substantially depend[ ] upon analysis of the terms of an agreement made between the parties in a labor contract?,' Allis-Chalmers, 471 U.S. at 220 . . . ." Newberry, 854 F.2d at 1147.

210. Newberry, 854 F.2d at 1147.

211. Id. at 1149.

212. 858 F.2d 1165 (6th Cir. 1988), vacated for reh'g en banc, 866 F.2d 838 (1989). Smolarek was a consolidation of two cases where both employees brought claims against the employer alleging discrimination under Michigan's Handicappers' Civil Rights Act (HCRA). Id. at 1166. In addition, both brought actions alleging retaliation for filing workers' compensation. Id. Both employees, Smolarek and Fleming, were covered by the collective bargaining agreement. Id. at 1166-67. The employees brought the actions in state court and Chrysler removed to federal district court where the court found that § 301 preempted all the plaintiffs' claims and dismissed the plaintiffs' claims for failure to exhaust remedies set out by the collective bargaining agreement. Id.

Smolarek's HCRA discrimination claim asserted that he was fired because of
for an analysis of section 301 preemption. The court found the retaliatory discharge claim to be essentially the same claim as addressed in Lingle and, with little discussion, found it not preempted by section 301. The court next looked to the preemptive effect of section 301 on plaintiff Fleming’s discrimination claim. The court first looked to the elements the employee would need to demonstrate to establish prima facie liability under the state statute. The court found both elements to be “purely factual questions” relating to the conduct and motivation of the employer. To defend against the action, Chrysler would have to show “that its actions were motivated by some factor other than [the employee’s] handicap.” The court acknowledged that Chrysler would likely assert that it based its actions on provisions in the collective bargaining agreement. Nevertheless, the court held that the resolution of the discrimination claim would involve purely factual inquiries, and not involve interpretation of the collective bargaining agreement, because the court would only need to determine Chrysler’s motivation. Therefore, the court concluded that the claim was sufficiently independent of the collective bargaining agreement to “escape” section 301 preemption.

Finally, the Eighth Circuit held an employee’s state wrongful discharge claim preempted in Hanks v. General Motors Corp. The court a seizure he experienced at work. Id. at 1166. On appeal, Smolarek only asserted that the district court had erred in denying his motion to remand on the issue of discrimination under the HCRA. Id. The court of appeals concluded that the district court had erred in denying Smolarek’s motion. Id. at 1170. The court of appeals noted that Chrysler may assert its defense that Smolarek’s treatment was allowed or required by the terms of the collective bargaining agreement and not based on Smolarek’s handicap. Id. The court stated that the state court may need to determine whether § 301 preempts Smolarek’s claim based on Chrysler’s defense. Id. (citing Caterpillar, Inc. v. Williams, 482 U.S. 386, 398 (1987)). However, the court stated that the issue of preemption need not be decided here because Smolarek’s claim was based solely on the state statute and not federal law or the collective bargaining agreement. Id.

213. Smolarek, 858 F.2d at 1168. The court stated that Lingle attempted to clarify the language in Allis-Chalmers on what state claims have “independence” from the collective bargaining agreement and not preempted. Id.

214. Id. at 1168-69.

215. The court stated: “In contrast to Smolarek’s appeal from an order denying remand, Fleming appeals directly from the district court’s decision finding § 301 preemptive of Fleming’s HCRA and retaliatory discharge claims. Therefore, we must consider the preemption issue ... .” Id. at 1170.

216. Id. The elements necessary to establish liability under the HCRA are: (1) the employer took adverse employment actions against the employee and (2) the actions were motivated by the employee’s handicap. Id.

217. Id. (citing Lingle, 108 S. Ct. at 1882).

218. Id. at 1171.

219. Id.

220. Id.

221. Id.

222. 859 F.2d 67 (8th Cir. 1988). Hanks was a line worker covered by a
reasoned that "[i]n order to determine whether . . . [the employee] was wrongfully discharged, the court must interpret the terms of the collective bargaining agreement covering termination of employment for failure to return to work."\textsuperscript{223} The court stressed that the elements necessary to establish the tort would require interpretation of the collective bargaining agreement.\textsuperscript{224}

The courts which have viewed \textit{Lingle} as a "twin test" with \textit{Allis-Chalmers} for determining which state actions are independent of the collective bargaining have split depending on the elements of the particular claim and the need to look to the agreement for resolution of the state law claim. This approach is inconsistent with the policies underlying section 301 because disputes arising out of the employment relationship which are covered by collective bargaining agreements are being decided by the court in the first instance and with inconsistent results depending on the state's formulation of the claim at issue.

\textbf{B. Two-Step Inquiry Under Section 301 Preemption}

Other courts view \textit{Lingle} as involving a two-step inquiry under section 301 preemption: (1) whether the state law claim is independent of the collective bargaining agreement; and (2) whether the state law claim is nonnegotiable. In \textit{Miller v. AT&T Network Systems},\textsuperscript{225} a unionized employee brought two state claims, one alleging discrimination based on physical handicap in violation of a state statute and another claim for intentional infliction of emotional distress.\textsuperscript{226} The Ninth Circuit held

\begin{itemize}
  \item \textit{Id.} Hanks was out of work due to severe depression caused by an incident that occurred at work. \textit{Id.} at 68. Hanks was deemed by General Motors (GM) to have voluntarily quit after failing to return to work when ordered to do so. \textit{Id.} Hanks filed in state court alleging four counts: outrageous conduct by GM; wrongful discharge; prima facie tort; and intentional infliction of emotional distress. \textit{Id.} GM removed the actions to federal district court where they were dismissed as preempted by § 301. \textit{Id.} Although the Eighth Circuit affirmed the preemption of the wrongful discharge claims, the court withheld judgment on the preemption of the other three causes of action. \textit{Id.} at 70. The court stated that on the surface these causes of action did not require interpretation of the collective bargaining agreement. \textit{Id.} However, since it is necessary to also consider if the defenses to be raised require such an interpretation, and no answer had been filed, the court found it impossible to determine if these actions were preempted. \textit{Id.}
  \item \textit{223.} \textit{Id.} at 69.
  \item \textit{224.} \textit{Id.} at 72.
  \item \textit{225.} 850 F.2d 543 (9th Cir. 1988). The court in \textit{Miller} noted that its opinion was completed at the time \textit{Lingle} was decided, but stated that \textit{Lingle} confirms the Ninth Circuit's approach and reaffirms the holding in \textit{Allis-Chalmers}. \textit{Id.} at 551 n.6. In \textit{Miller}, the court continues to use the nonnegotiable language from \textit{Allis-Chalmers} even though \textit{Lingle} explicitly stated that this was not a necessary element when determining "independence" for purposes of § 301 preemption. \textit{226.} \textit{Id.} at 550-51. Miller worked for AT&T for 20 years and was covered by a collective bargaining agreement. \textit{Id.} at 545. Miller was discharged for refusing to return to work in Mesa, Arizona after he fainted due to the effect of high temperatures on his heart rate. \textit{Id.} Miller sued in state court and AT&T
\end{itemize}
the emotional distress claim preempted because resolution of the tort claim requires inquiry into the collective bargaining agreement to determine the appropriateness of the employer’s behavior. However, the court held the discrimination claim not preempted because it was based on a “nonnegotiable, independent state right.” The court stated that interpretation of the concept of “nonnegotiable” is clear: “[A] right is nonnegotiable if the state law does not permit it to be waived, alienated, or altered by private agreement.” This would require a statutory right with an express bar on waiver of the right.

However, the court found the concept of “independence” from rights established by the contract more difficult to define. The court stated that independent rights are those state law rights that can be enforced without relying on the terms of the labor contract. However, mere similarity between state law protections and provisions in the collective bargaining agreement does not mandate preemption. Rather, preemption requires that the dispute could be resolved under the collective bargaining agreement and that state law cannot be applied without reference to the terms of the collective bargaining agreement.

Further, the Ninth Circuit in Miller set out a hybrid test for section 301 preemption using Allis-Chalmers as a basis. The court stated that when deciding whether section 301 preempts state law claims a court must consider: (1) whether the collective bargaining agreement contains explicit or implied provisions that govern the actions giving rise to a state claim; (2) whether there is a sufficiently clear state standard which would allow resolution without interpreting the collective bargaining agreement; and (3) whether the state claim can be altered or waived by the collective bargaining agreement. The court stated that a state law removed to federal district court where it obtained summary judgment on both claims based on § 301 preemption. Id.

227. Id. at 551. The court stated that intentional infliction of emotional distress claims may not be preempted where particular behavior by the employer has been explicitly prohibited by mandatory statute or judicial decree. Id. at 550 n.5.

228. Id. at 546, 549-50.
229. Id. at 546.
230. Id.
231. Id.
232. Id.

233. Id. The court rejected the defendant’s contention that the state statute was preempted because the collective bargaining agreement offered parallel protection. Id.

234. Id.
235. Id. at 548.

236. Id. Further, the Ninth Circuit stated that preemption in Allis-Chalmers was not based on the overlap of state tort law and the collective bargaining agreement but rather was based on the fact that there was no articulated, independent standard by which to judge the action. Id. at 546. The Ninth Circuit asserted that this lack of an articulated, independent standard by which to judge the state action permits private parties to contractually modify the state stan-
claim will be preempted under this test only if the answer to the first question is "yes" and the answer to either the second or third is "no."\(^{237}\)

The First Circuit also held an employee’s state law claims preempted in *Jackson v. Liquid Carbonic Corp.*\(^{238}\) Consistent with *Lingle*, the First Circuit asserted that the section 301 preemption analysis begins with the question of whether the state claim can be resolved without interpreting the collective bargaining agreement.\(^{239}\) The court gave several reasons for the conclusion that the employee’s privacy claims based on federal and state law cannot be resolved without interpreting the collective bargaining agreement: (1) there is no absolute right to be free from drug testing under either the state or federal constitution; (2) under the state or federal constitution or Massachusetts state privacy law, the claim’s resolution rests on the balancing of the employer’s legitimate concerns and the employee’s privacy rights; and (3) a right subject to a balancing of interests of the employee and employer is defined by the parties and, therefore, preempted.\(^{240}\)

dard. *Id.* In holding Miller’s state claim of intentional infliction of emotional distress preempted, the court started by asking the three questions it had outlined earlier and found that this claim was preempted because it required interpreting the terms of a collective bargaining agreement and the claim was negotiable. *Id.* at 550-51.

237. *Id.* at 548.

238. 863 F.2d 111 (1st Cir. 1988). Jackson, a truckdriver, was covered by a collective bargaining agreement which contained a “management rights” clause and a provision outlining mandatory grievance and arbitration procedures. *Id.* at 112-13. Jackson was discharged after his employer found, through a drug testing program, traces of drugs in his urine. *Id.* at 113. Jackson did not pursue the grievance procedures and brought an action in state court alleging three counts: that the search and seizure of his urine violated the state civil rights act by interfering with his right to privacy and to be free from unreasonable searches and seizures under state and federal law; that the seizure and testing of his urine constituted an invasion of privacy under state law; and that his discharge constituted a wrongful dismissal in violation of public policy. *Id.*

239. *Id.* at 114. The court discussed at length the purpose and history behind § 301 preemption. *Id.* Specifically, the court focused on the importance of uniform interpretation and grievance-arbitration procedures. *Id.* (“[W]here the [labor] contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanism without dealing with the merits of the dispute.”) (quoting *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29 (1987)).

240. *Id.* at 115-17. The court did not analyze the search and seizure claims because the “reasonableness” inquiry is the same under the state constitution, the federal constitution and the state privacy claims. *Id.* at 119 n.4.

In its discussion on whether the state privacy claim is independent of the collective bargaining agreement, the court cited *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988), for the proposition that there must exist an “established or recognized state claim” to establish that the state claim is independent of the collective bargaining agreement. *Jackson*, 863 F.2d at 115. The court also pointed to its earlier decision in *Bratt v. IBM*, 785 F.2d 352 (1st Cir. 1986), where it recognized that privacy rights are affected by a firm’s own regulations. *Jackson*, 863 F.2d at 117.
Moreover, the court reasoned that the employee's rights here were negotiable and could be waived or altered by the agreement. However, similar to the Ninth Circuit's test in Miller, the court pointed out that if the state created a privacy action, either by enacting a "sufficiently explicit statute" or by "sufficiently pointed judicial explication," analysis of preemption would be different because interpretation of collective bargaining agreement may not be necessary.

The courts which view the analysis of preemption under section 301 as a two-step inquiry seem to read Lingle as involving an independent and nonnegotiable state right, thus falling within the Gardner-Denver exception to the federal labor policies underlying section 301 preemption. Under this view, section 301 would preempt state tort actions if resolution of the claim is dependent on the collective bargaining agreement and there is no explicit state statute or controlling judicial decision which makes the right nonnegotiable.

VI. Conclusion

The Supreme Court in Lingle failed to set out a new test which will relieve the tension between federal preemption under section 301 and state law claims. In fact, the courts of appeals have again split on their interpretations of section 301 preemption. It is likely that the Supreme Court will again address the parameters of preemption under section 301.

In order to align the Lingle decision with Supreme Court precedent, Lingle could be viewed as an example of an independent, nonnegotiable state right which is not preempted by section 301 under Allis-Chalmers. Viewed in this way, as a narrow exception analogous to the Gardner-Denver line of exceptions to the federal labor policies underlying section 301, Lingle is more consistent with Supreme Court pronouncements over the past thirty years. However, Lingle does not clearly fit in this line of exceptions because the state statute relied on did not involve a minimum substantive right.

A better view of the Lingle decision is that the analysis, unarticulated by the Court, is laid out in Miller v. AT&T Network Systems. The Miller
analysis contains an excellent articulation of the holding in \textit{Allis-Chalmers} and a workable analysis for section 301 preemption. Further, the \textit{Miller} analysis accommodates both the state interest in providing minimum labor standards and federal labor policies. When faced with the issue of section 301 preemption and state law claims, courts should view the analysis in \textit{Miller} as a good framework for deciding the parameters of preemption under section 301.

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