ARTICLES

THE DISCORD BETWEEN COLLECTIVE BARGAINING AND INDIVIDUAL EMPLOYMENT RIGHTS: THEORETICAL ORIGINS AND A PROPOSED SOLUTION

RICHARD A. BALES*

* Visiting Assistant Professor of Law, The University of Montana Law School. J.D., Cornell Law School, 1993. Special thanks to Katherine Van Wezel Stone for her inspiration; Jennifer Bales and Stewart Schwab for their unflagging support; Kathleen Vaughan for her secretarial assistance; Toni Dinh for her research and editorial assistance; and Jane Dolkart, Stephen Ware, and Chris Mammen for their helpful comments.

INTRODUCTION

As union membership declines, so too does the collective bargaining model of workplace governance. This model was reified by the National Labor Relations Act ("NLRA"),[1] one of the most significant pieces of legislation to come out of the New Deal.[2] The NLRA was premised on the assumption that the best way to protect American employees[3] was to give them sufficient bargaining power[4] to permit meaningful negotiation over the terms and conditions of employment.[5] The goal of the NLRA was to give employees the legal protection they needed to organize, so that they could bargain collectively for those workplace rights and benefits they valued most.

Over the last thirty years, however, the collective bargaining model has been gradually replaced by a model centered on individual employment rights.[6] This new model emphasizes the legislative and judicial creation of

---

[1] 29 U.S.C. §§ 151-169 (1994).

[2] *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 941 (1997) (describing the Wagner Act as the "centerpiece of the second New Deal"). *But cf.* Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 522 n.14 (1994) (arguing that it is a misnomer to refer to the NLRA as New Deal legislation because the Act was not a part of the Roosevelt Administration's New Deal program, but rather was a unique product of the efforts of Senator Robert Wagner).

[3] Interestingly, most academics writing about "labor" law—law relating to the NLRA—tend to use the word "workers," while those academics writing about "employment" law—law governing the workplace other than the NLRA—prefer the word "employees."

[4] *See* Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1028-34 (1996) (discussing bargaining power and unconscionability in the context of employment arbitration agreements); *see also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (defining bargaining power as "an absence of meaningful choice on the part of one of the parties").

[5] *See* 29 U.S.C. § 151.

[6] *See* R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the*

certain minimal terms of employment that inure to employees without the necessity of any bargaining. These rights may be enforced judicially through private rights of action, by federal and state administrative agencies, or by a combination of both. Individual employment rights include, for example, the rights created by state and federal legislation prohibiting discrimination on the basis of race or sex, and the rights created by state common law doctrines giving employees a cause of action against their employers for intentional infliction of emotional distress or for wrongful discharge in violation of public policy.

These two models of workplace governance are not necessarily mutually exclusive. Individual employment rights enhance the effectiveness of organized labor by removing general issues from the bargaining table and permitting unions to concentrate on issues of more particular interest to the employees in a specific workplace or industry.[7] Similarly, these rights could help to resolve issues such as race or age discrimination that have traditionally divided unions from within.[8] One example of an individual employment right that was designed specifically to enhance collective bargaining is the Fair Labor Standards Act ("FLSA"),[9] which was promulgated in 1938 to create a minimum wage,[10] to require premium pay for overtime work,[11] and to restrict child labor.[12] Proponents of the FLSA intended for it to provide a floor to support, not supplant, collective bargaining.[13]

Compulsory Arbitration of Individual Employment Rights, 30 HOUS. L. REV. 1863, 1874-81 (1994) (discussing the emergence of legislatively imposed individual employment rights); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 593 (1992) ("[T]he emerging regime of individual employee rights represents not a complement to or an embellishment of the regime of collective rights but rather its replacement."); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10-11 (1988) ("There is current recognition that if the majority of employees are to be protected, it must be by the law prescribing at least certain rights of employees and minimum terms and conditions of employment.").

[7] *See* Stone, *supra* note 6, at 577 (asserting that individual employment rights could potentially bolster union bargaining, allowing unions to focus on more particular matters by removing more general issues from the table, but also observing that such externally imposed rights have not as yet had this effect).

[8] *See id.* (explaining that externally imposed employment rights may strengthen union support by allowing tradeoffs between groups within the union to be blamed on the government rather than the union).

[9] 29 U.S.C. §§ 201-219.

[10] *See id.* § 206.

[11] *See id.* § 207.

[12] *See id.* § 212.

[13] *See* J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 203-04 (1968) ("[T]he fixing of minimum wages and maximum hours by government fiat was merely the foundation upon which can be built the mutual efforts of a

The FLSA, however, is the exception, not the rule. Despite the potential of laws creating individual employment rights to help unions and to bolster their bargaining power, the opposite has occurred. This is because courts have interpreted the Labor Management Relations Act ("LMRA")[14] section 301 preemption doctrine and the Federal Arbitration Act ("FAA")[15] "arbitrability doctrine" as effectively withdrawing from unionized employees many of the individual employment rights that statutes or common law ostensibly confer on all employees. Paradoxically, nonunion employees frequently have more workplace rights than their unionized counterparts. This penalty on union membership has weakened unions and their bargaining power, and has made the two models of workplace governance both practically and theoretically incompatible.

Section 301 of the LMRA grants federal courts jurisdiction to hear suits for violations of collective bargaining agreements.[16] To provide a uniform interpretation of collective bargaining agreements that often are national in scope, courts have interpreted section 301 broadly as preempting any state law that might affect the interpretation of these agreements. Many, though not all, state laws creating individual employment rights are preempted by section 301. The effect of preemption is to convert a unionized employee's state law claim, for which the employee would have a judicial remedy, into a federal section 301 claim for breach of a collective bargaining agreement, which must be arbitrated.

If the effect of section 301 preemption were only to change the forum in which union employees' claims were decided from the courtroom to an arbitral conference room, there would be no cause for undue concern. The doctrine, however, is not nearly so benign. Arbitrators appointed to hear disputes arising under collective bargaining agreements have authority only to interpret the contractual "law"—that law created by the collective bargaining agreement itself. In other words, if they consider external sources of law, they have exceeded the scope of their authority and their award must be vacated.[17] The practical effect of applying the section 301 preemption doctrine to collective bargaining agreements is to extinguish, for unionized employ-

---

revived industry and a rehabilitated labor."); *see also* Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1175-76 (7th Cir. 1987) (reviewing the legislative history of the FLSA and concluding that the FLSA was passed, in part, because "unions' efforts to negotiate for overtime provisions in collective bargaining agreements would be undermined if competing, non-union firms were free to hire workers willing to work long hours without overtime"); Summers, *supra* note 6, at 9 (noting that the FLSA was intended to support collective bargaining).

[14] 29 U.S.C. §§ 141-197.

[15] 9 U.S.C. §§ 1-16 (1994).

[16] *See* 29 U.S.C. § 186(e).

[17] *See* David E. Feller, *Arbitration and the External Law Revisited*, 37 ST. LOUIS U. L.J. 973, 975 (1993) (distinguishing external or public law from the internal, contractual law of the collective bargaining agreement).

ees, a significant number of the legal rights that are conferred ostensibly on all employees.

Until recently, courts have assumed that individual employment rights not preempted by section 301 remained fully enforceable by unionized employees. This has meant that although many state common law rights and some state statutory rights were preempted, other state created rights and all federally created rights remained unaffected. For example, the right conferred by Title VII of the Civil Rights Act of 1964 ("Title VII")[18]—to be free from workplace discrimination on the basis of race, sex, religion, age, or disability—was not affected by the section 301 preemption doctrine, leaving unionized employees, until now, free to enforce these rights in court.

A second doctrine has begun to emerge, however, that may impose severe limitations on many of these unpreempted rights. Although these limitations are not as onerous as outright preemption, they nonetheless leave unionized employees with significantly less legal protection than their unorganized counterparts. This second doctrine, which I call the "FAA arbitrability doctrine," has its origin in the FAA. The FAA creates a body of federal substantive law that permits judicial enforcement of arbitration agreements. The FAA arbitrability doctrine provides that a predispute arbitration agreement is enforceable not only as to contractual rights, but also as to statutory and common law rights. In other words, parties who have signed a predispute arbitration agreement are barred from seeking relief in court.

Nearly every collective bargaining agreement contains an arbitration clause.[19] Until recently, courts and commentators have assumed that the arbitrability doctrine does not apply to the arbitration clauses found in collective bargaining agreements.[20] In the last few years, however, several courts have held that if an employee with a statutory or common law claim is covered by a collective bargaining agreement containing an arbitration clause, that claim must be arbitrated rather than litigated.[21]

Requiring arbitration under the FAA arbitrability doctrine has an effect that is different from requiring arbitration under the section 301 preemption doctrine. Under the FAA, a claim will be ordered to arbitration only if the collective bargaining agreement makes the claim arbitrable, thereby giving the arbitrator authority to resolve it. The FAA arbitrability doctrine, there-

---

[18] 42 U.S.C. § 2000e-2 (1994).

[19] *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 411 n.11 (1988) (noting that 99% of sampled collective bargaining agreements contained arbitration clauses); Martin v. Shaw's Supermarket, Inc., 105 F.3d 40, 42 (1st Cir. 1997) (noting that arbitration clauses are "almost always a feature of labor contracts"); Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997) ("[A]rbitration becomes an issue in a section 301 case only when a collective bargaining agreement happens to contain (as most such agreements do) an arbitration clause.").

[20] *See infra* notes 185-209 and accompanying text.

[21] *See infra* notes 240-52 and accompanying text.

fore, does not directly eviscerate the affected legal rights of unionized employees to the extent to which the section 301 preemption doctrine does. Nonetheless, two characteristics of labor arbitration under the FAA create an effect similar to section 301 preemption. The first is the unavailability of damages beyond reinstatement and back pay. Unionized employees are denied the right, conferred by statute or authorized by tort law, to compensatory and punitive damages. Thus, employees who have not been discharged and therefore are ineligible to receive an award of backpay—such as those employees who "merely" complain of sexual or racial harassment—are denied any compensation. The second characteristic is the exclusive right of the union, within narrow limitations, to control the prosecution of the legal claim. If a union decides not to pursue an employee's claim, the claim vanishes, and the employee has virtually no legal recourse. Although the union's interest in enforcing the collective bargaining agreement usually is aligned with the aggrieved employee's, this is not always the case. Union interests may diverge from those of a particular employee, especially in discrimination cases or where the union desires to use the grievance as a bargaining chip in negotiating other matters.

Together, the section 301 preemption doctrine and the FAA arbitrability doctrine eviscerate an overwhelming proportion of unionized employees' individual employment rights. The two doctrines have not only a similar practical effect, but also a similar theoretical origin, stemming from the underlying principles of collective bargaining known as industrial pluralism.[22] According to the principles of industrial pluralism, meaningful collective bargaining is the apotheosis of labor-management relations. The only proper

---

[22] "Industrial pluralism" has been defined as a mode of industrial governance that operates in accord with the following principles:

(1) creation of a democratic workplace through collective bargaining;
(2) agreement to use arbitration as the dispute resolution mechanism;
(3) operation of the workplace as a mini-democracy without government intervention;
(4) the rights of a majority of union members take priority over individual rights in collective bargaining; and
(5) the right to bargain collectively and to arbitrate disputes are labor's only governmental protection.

See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1516 (1981).

Professor Katherine Van Wezel Stone has explained the section 301 preemption doctrine as a product of the industrial pluralist perspective. *See* Stone, *supra* note 6, at 624-28. Contrary to the position of this Article, however, Professor Stone argues that the FAA arbitrability doctrine *enforces* statutory claims, and therefore does not have the eviscerating effect of section 301 preemption. *See id.* at 635. Due to this assumption, Professor Stone neither examines the influence that industrial pluralism has had on the arbitrability doctrine, nor recognizes that this influence broadens considerably the scope of individual employment rights that are denied to unionized employees as a result of industrial pluralism.

role of the law in the workplace is to give employees the right to organize, since organization is a precondition to meaningful collective bargaining. Once this is done, the law should allow employees and employers to negotiate for themselves the terms and conditions of employment. Individual employment rights, by withdrawing certain items from the negotiating table, interfere with the pluralist ideal of an autonomous and comprehensive process.

Industrial pluralism's strong ethos of workplace autonomy is inimical to the judicial and legislative creation of individual employment rights for unionized employees. It is not, however, the only possible perspective on collective bargaining. This Article suggests an alternative perspective, one that recognizes collective bargaining and individual employment rights as compatible and mutually reinforcing.

Part I of this Article discusses the decline in union membership and the replacement of collective bargaining by individual employment rights. Part II traces this transition to the doctrines of section 301 preemption and statutory arbitrability. Part III bases the two doctrines in the industrial pluralist paradigm of collective bargaining. Part IV evaluates the collective bargaining and individual employment rights models of workplace governance and demonstrates that neither model, by itself, adequately protects the interests of American employees. This Part then discusses the solution suggested by the majority of commentators who have criticized the preemption and arbitrability doctrines, and argues that this solution fails to protect the employees most in need of protection. Finally, the Article suggests an alternative approach that could help both to enhance organized labor and to make meaningful employment rights available to all employees.

I. THE DECLINE OF COLLECTIVE BARGAINING AND THE EMERGENCE OF INDIVIDUAL EMPLOYMENT RIGHTS

A. *The Disappearance of Unions from the Private Sector Workplace*

During the twenty years following the 1935 passage of the NLRA, the union density rate—the percentage of unionized nonagricultural workforce participants—soared from approximately 15% to approximately 35%.[23] In the mid-1950s, however, union density peaked at between 35 and 40%, and has been falling steadily ever since.[24] By 1993, union membership had fallen

---

[23] Precise figures vary by author depending on how the numerator and denominator are defined, but the general trend is apparent regardless of the figures used. For discussions of the trend, see MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10 (1987) (providing U.S. Department of Labor statistics); PAUL C. WEILER, GOVERNING THE WORKPLACE 8-9 (1990) (discussing the upward trend in union membership from the enactment of the NLRA until the mid-1950s).

[24] *See, e.g.*, Henry S. Farber, *The Recent Decline of Unionization in the United States*, 238 SCIENCE 915, 915 (1987) ("[T]he rate of decline [in union membership] has acceler-

to 13% of the nonagricultural workforce.[25] When the recent increase in public sector unionization is discounted, the decline of private sector unionization becomes even more vivid. The current private sector density rate is 10.9%,[26] and the decline shows no sign of reversal.[27]

Commentators have advanced many theories to explain the demise of the NLRA collective bargaining model. The "employer-opposition theory"[28] holds that unions have declined because employers, with Republican encouragement, have intensified their attempts to avoid or eliminate unions.[29]

---

ated dramatically since the mid-1970's."); Stone, *supra* note 6, at 578-84 (providing various theories to account for the dramatic decline in union membership during the 1980s).

[25] *See* Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 9-10 (1993) (blaming the fact that unions represent less than 13% of private sector workers on "an unleashing of competitive forces in the markets for American products and services"); Leo Troy, *The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR*, *in* UNIONS IN TRANSITION 75, 82 (Seymour Martin Lipset ed., 1986) (noting that union representation of the private sector nonagricultural workforce declined from 35.7% in 1953 to 26.6% in 1973 and 17.8% in 1983).

[26] *See Data for 1994 Shows Membership Held Steady at 16.7 Million*, Daily Lab. Rep. (BNA) No. 27, at D-1 (Feb. 9, 1995) (noting the decline in private sector union membership since the mid-1950s).

[27] *See* WEILER, *supra* note 23, at 10 (predicting that union density will fall to less than 10% by the year 2000).

[28] *See* Stone, *supra* note 6, at 579 (coining and defining the term).

[29] *See, e.g.*, Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 732 (1983) (discussing the Reagan Administration's stern response to the air traffic controller's strike); David L. Gregory, Book Review, 53 GEO. WASH. L. REV. 680, 681-83 (1985) (reviewing RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984)) (discussing how President Reagan's crushing of the air traffic controller's strike changed the NLRB's attitude toward labor law); *see also* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 250 (1984) (recommending that the power of management to oppose unionization be limited); William N. Cooke, *The Rising Toll of Discrimination Against Union Activists*, 24 INDUS. REL. 421, 437 (1985) (noting that where an employer discriminates in its hiring and tenure policy to influence union membership, the probability of a union victory in certification elections can be reduced by as much as 17%); William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 574-75 (1983) (concluding that employers' written communications, captive audience speeches, threats, and actions taken against union supporters all have statistically significant effects on voting in union certification elections); Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?*, *in* CHALLENGES AND CHOICES FACING AMERICAN LABOR 60-61 (Thomas A. Kochan ed., 1985) (arguing that "employer opposition has a substantial and highly statistically significant depressant effect on union success rates"); Thomas A. Kochan et al., *The Effects of Corporate Strategy and Workplace Innovations on Union Representation*, 39 INDUS. & LAB. REL. REV. 487, 499 (1986) (presenting the results of a survey that demonstrates that "top level managerial values or strategies toward unionization and innovations at the work place affect the ability of unions to maintain or expand

Similarly, the "broken-NLRB" school argues that the National Labor Relations Board's ("NLRB") inability to protect union rights—due, for example, to the weak sanctions available for punishing employer violations of the NLRA—have rendered unions powerless to protect their constituents from employer abuses.[30] The "union-complacency" school[31] places the blame for union decline on labor's failure to organize new members.[32] These three theories share a basic assumption: if employers respected the labor laws, the NLRB had meaningful authority to enforce those laws, and unions redirected and expanded their organizing efforts, union decline could be reversed.

Other commentators, however, believe that the problems of the collective bargaining model are much more deeply ingrained.[33] Christopher Tomlins

---

their representation").

[30] *See, e.g.*, WEILER, *supra* note 23, at 235 (1990) (explaining that "the weakness of [the NLRA's] legal regime" is substantially responsible for the decline of unionization); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293-325 (1978) (arguing that judicial constructs such as labor contractualism, the public right doctrine, and the inhibition of worker self-activity have weakened the NLRA); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1773-74 (1983) (arguing that union decline is attributable largely to the failure of labor laws to protect employees from anti-union tactics).

[31] *See* Stone, *supra* note 6, at 580-81 (coining the term "union-complacency theory" to describe the view that union decline is the result of the failure of unions to adjust to a changing economy).

[32] *See, e.g.*, DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 142-47 (1973) (attributing organized labor's decline to its inability to organize white-collar workers, blacks, and women); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1171-72 (1991) (noting that the influx of women into the workforce has been cited as a barrier to union growth by those holding the belief that women are hard to organize); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 648-49 (noting the traditional underrepresentation of minorities and women in unions, and emphasizing the need to include these groups); William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950-1980*, 38 IND. & LAB. REL. REV. 323, 333 (1985) (concluding that labor's decline is the combined result of "a decrease in the extent and intensity of union organizing efforts [and] a decreased willingness on the part of workers to join unions"); Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649, 652-66 (1983) (discussing the history of discrimination in the labor movement and proposing the use of affirmative action to increase the representation of minorities and women in union leadership); Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 645 (1985) (attributing union decline, in part, to the failure of unions to appeal to the young, women, minorities, and white-collar workers).

[33] *See, e.g.*, THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 78 (1986) ("[T]he effects of these problems with the law and its administration have been small compared to the larger forces affecting union membership

has argued that an inherent conflict exists between the need for industrial stability, which forces the arbitral system to accord superior rights to management, and the need to protect workers' bargaining power, which can only be exercised by the use or threat of disruptive strikes.[34] Efficiency theorists, such as Richard Posner, posit that by monopolizing labor and raising its costs above market value, labor inevitably prices itself out of competitive markets.[35] Industrial relations experts have proposed several theories of industrial transition, pointing to phenomena such as the globalization of labor markets or the shift in the American economy from manufacturing to services, as explanations for union decline.[36] Finally, several legal commentators have argued that the statutory and judicial creation of individual employment rights have both signaled and caused the demise of the collective bargaining model.[37]

None of these theories alone, however, adequately account for union decline. Explanations that focus on the twelve-year domination of the NLRB by Republicans or the recent resurgence in employer belligerence to unionization fail to account for the fact that union density began its steady decline forty years ago, and continued apace through President Carter's pro-labor

---

declines. Reversing union membership trends will take more than labor law reforms.").

[34] *See* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 1880-1960, at 317-28 (1985) (pointing out that the state interest in industrial stability led to restrictions on workers' collective activities).

[35] *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1001 (1984) ("[T]he intended and actual effect of unionization is to raise the price of labor above the competitive level and to depress the supply of labor below the competitive level in the unionized sector . . . ."); *see also* Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1004-10 (1986) (creating an economic model describing union monopolization of labor); Robert J. Flanagan, *NLRA Litigation and Union Representation*, 38 STAN. L. REV. 957, 984-86 (1986) (noting that increases in the union/nonunion wage differential have a negative effect on union membership); Robert H. Lande & Richard O. Zerbe, Jr., *Reducing Unions' Monopoly Power: Costs and Benefits*, 28 J.L. & ECON. 297, 300-06 (1985) (discussing the causes and effects of the union/nonunion wage differential).

[36] *See, e.g.*, BELL, *supra* note 32, at 129-42 (citing as factors contributing to union decline, the shift in the American economy from manufacturing to services, and the inability of unions to organize newly created white-collar occupations). *See generally* KOCHAN ET AL., *supra* note 33, at 53-144 (arguing that environmental pressures such as deregulation, recession, foreign competition, and labor market changes, combined with strategic choices implemented by management, have created a completely new industrial relations system).

[37] *See, e.g.*, Stone, *supra* note 6, at 643 (explaining that the individual employment rights available to nonunionized employees create a disincentive for workers to organize); Summers, *supra* note 6, at 10-11 (expressing the view that labor law is undergoing a "changing of the guard"—that collective bargaining is giving way to more efficient, legislatively mandated individual employee rights). *But see* Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 197-99 (1991) (arguing that unions have a significant role in the enforcement of workers' public rights).

tenure.[38] Likewise, commentators who argue that the reasons for union decline are the weak enforcement provisions or the inherent contradictions contained within the NLRA cannot explain why, for its first twenty years, the collective bargaining model was so successful.[39] Union-centered criticism fails to recognize unions' successful efforts in recent years to expand their organization drives beyond the manufacturing sector and to organize women, minorities, hospital workers, retail clerks, and other pink- and white-collar workers successfully.[40] Efficiency theorists ignore empirical evidence that suggests that because labor markets are not perfect markets, there is room for collective bargaining without loss of economic equilibrium.[41] Finally, the theory that collective bargaining is being undermined by individual employment rights fails to address arguments that the two models are not inherently mutually exclusive.

B. *The Emergence of Individual Employment Rights*

Employment sector legislation began in the early 1900s, when states began passing workers' compensation statutes.[42] These statutes supplanted the tort litigation system and established administrative agencies to oversee compensatory payments to injured workers.[43] Federal employment legislation made its first appearance in 1908 with the passage of the Federal Employers' Li-

---

[38] *See* WEILER, *supra* note 23, at 228 (noting that the decline of unionization began long before Reagan's election and that "the flaws in the national labor laws are buried deep within the structure of the statute").

[39] *See* CLINTON S. GOLDEN & HAROLD J. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 36 (1942) (noting the NLRB's failure, during the late 1930s and early 1940s, to offer substantive protections to unions).

[40] *See* U.S DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, 32 EMPLOYMENT & EARNINGS 208-09 tbls.52-53 (1985) (presenting a statistical breakdown of union membership by age, sex, race, occupation, industry, and full- or part-time status); Stone, *supra* note 6, at 581-82 ("[T]o attribute union decline to the failure of unions to organize new types of workers is to ignore the facts.").

[41] *See* Bruce E. Kaufman, *The Postwar View of Labor Markets and Wage Determination*, *in* HOW LABOR MARKETS WORK 145, 165 (Bruce E. Kaufman ed., 1988) (explaining that the post-war labor economists, in contrast to the neoclassical economists, viewed labor market imperfections relating to wage levels, hours, and working conditions as a background that made collective bargaining a suitable choice of means for moving the labor market closer to the competitive ideal).

[42] For a general discussion of the role states have played in the creation of individual employment rights, see Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 489-509 (1993).

[43] *See* 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.30 (1994) (stating that by 1920, most states had adopted compensation acts, and that by 1949, all states had such acts in place).

ability Act,[44] which provided remedies for injured employees of those common carriers engaged in interstate commerce.[45] In 1938, Congress passed the FLSA.[46] The FLSA, however, was intended merely to provide a floor to support collective bargaining.[47] Statutory protection for broad categories of nonunion workers began in earnest in 1963 when Congress enacted the Equal Pay Act,[48] which prohibited wage discrimination on the basis of sex.[49] The watershed event occurred a year later when Congress enacted Title VII, which prohibited discrimination in employment on the basis of race, color, religion, sex, or national origin.[50] Other key federal statutes enacted since then include the Age Discrimination in Employment Act of 1967 ("ADEA"),[51] the Occupational Safety and Health Act of 1970 ("OSHA"),[52] the Rehabilitation Act of 1973,[53] the Employee Retirement Income Security Act of 1974 ("ERISA"),[54] the Pregnancy Discrimination Act of 1978,[55] the Civil Service Reform Act of 1978,[56] the Employee Polygraph Protection Act of 1988,[57] the Worker Adjustment and Retraining Notification Act of 1988,[58] the Americans with Disabilities Act of 1990 ("ADA"),[59] the Civil Rights Act

---

[44] 45 U.S.C. § 51 (1994).

[45] *See id.*; LARSON, *supra* note 43, § 4.50 ("The Federal Employer's Liability Act of 1908 . . . may be regarded as the high point in this phase of the development of employee protection, for it embodied all the most advanced features of the state acts up to that time.").

[46] 29 U.S.C. §§ 201-219 (1994).

[47] *See* HUTHMACHER, *supra* note 13, at 203-04 (noting that, according to Senator Wagner, the fixing of minimum wages and maximum hours was merely a foundation for future efforts of labor and industry to work out their conflicts and problems among themselves); Summers, *supra* note 6, at 9 ("For nearly thirty years the only significant legislation was the Fair Labor Standard Act[,] . . . which was conceived largely to provide a floor to support collective bargaining.").

[48] 29 U.S.C. § 206(d).

[49] *See id.*

[50] 42 U.S.C. § 2000e-2 (1994).

[51] 29 U.S.C. §§ 621-634 (prohibiting workplace discrimination on the basis of age).

[52] *Id.* §§ 651-678 (setting guidelines for workplace safety).

[53] *Id.* §§ 701-797b (providing equal opportunities to individuals with disabilities).

[54] *Id.* §§ 1001-1461 (protecting employee pension benefits).

[55] 42 U.S.C. § 2000e(k) (prohibiting workplace discrimination on the basis of pregnancy, childbirth, and related medical conditions).

[56] 5 U.S.C. §§ 1101-8914 (1994).

[57] 29 U.S.C. §§ 2001-2009 (prohibiting the use of lie detectors and polygraphs in the workplace except under narrowly specified conditions).

[58] *Id.* §§ 2101-2109 (requiring notice to employees before plant closings and mass layoffs).

[59] 42 U.S.C. §§ 12101-12213 (prohibiting discrimination in employment on the basis of disability).

of 1991,[60] and the Family and Medical Leave Act of 1993.[61]

State legislatures, following Congress's lead, have passed legislation protecting employees in a wide variety of circumstances.[62] As of 1991, twenty-two states had made retaliatory dismissal for filing a workers' compensation claim unlawful, thirty-four states protected whistle-blowers, and forty-two states regulated the administration of employment-related lie detector tests.[63] In addition, many states restrict the use of drug testing in the workplace,[64] enforce workplace safety and health mandates,[65] and protect employees from the adverse effects of corporate takeovers.[66] Montana enacted the first state statute protecting workers from wrongful discharge.[67] Puerto Rico[68] and the

---

[60] *Id.* § 1981a (providing for damages in cases of intentional discrimination in employment).

[61] 29 U.S.C. §§ 2601-2653 (allowing employees to take leave for family and medical emergencies).

[62] *See* CHARLES C. HECKSCHER, THE NEW UNIONISM 160 (1988) (noting that state laws in some jurisdictions protect employees from discrimination based on sexual orientation, political involvement, marital status, medical condition, and criminal records).

[63] *See* Stone, *supra* note 6, at 592 (citing *Individual Employment Rights Manual*, 9A Lab. Rel. Rep. (BNA) 540-92 (1991)); *see also* Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1966-72 (1996) (describing how different state courts handle wrongful discharge cases brought by whistle-blowing employees).

[64] *See* Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON L. REV. 491, 520-30 (1990) (discussing statutory limits on private employers' use of drug testing); Judith M. Janssen, *Substance Abuse Testing and the Workplace: A Private Employer's Perspective*, 12 GEO. MASON L. REV. 611, 636-39 (1990) (citing examples of state laws limiting drug and alcohol testing by private employers).

[65] *See* Joleane Dutzman, Comment, *State Criminal Prosecutions: Putting Teeth in the Occupational Safety and Health Act*, 12 GEO. MASON L. REV. 737, 738-39 (1990) (noting the recent use of criminal penalties to supplement OSHA and enforce health and safety mandates); S. Douglas Jones, Comment, *State Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.'s Succeed Where OSHA Failed?*, 79 KY. L.J. 139, 147 (1990-91) (noting "the proliferation of state prosecutions for safety related crimes in the workplace").

[66] *See* Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 45-47 (1991) (discussing nonshareholder constituency statutes, which impose fiduciary duties on corporate directors with respect to those other than shareholders). For examples of such statutes, see *Symposium: Corporate Malaise—Stakeholders Statutes: Cause or Cure?*, 21 STETSON L. REV. app. 279-93 (1991).

[67] *See* Summers, *supra* note 6, at 14. The statute provides that:

> A discharge is wrongful only if: (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (3) the employer violated the express provisions of its own

Virgin Islands[69] have passed similar statutes.

While federal and state legislatures have imposed minimum terms on employment relationships, state courts have applied principles of contract and tort law to open gaping holes in the doctrine of employment at will.[70] For example, courts in at least thirty-five states have used contract law to bind employers to the tenure promises and discharge procedures outlined in employee handbooks.[71] Courts in eleven states have held that the breach of the covenant of good faith and fair dealing gives employees a cause of action for wrongful termination.[72] Most states will enforce an employer's oral promise concerning job tenure,[73] and at least one state court has at least partly implied such a promise from an employee's length of service.[74]

At least forty-three states have adopted a public policy exception to employment at will.[75] State courts use this exception, which gives employees a cause of action in tort, to protect employees who are fired for refusing to commit an unlawful act,[76] for exercising a statutory right,[77] or for perform-

---

written personnel policy.

MONT. CODE ANN. §§ 39-2-901 to -915 (1993).

[68] P.R. LAWS ANN. tit. 29, § 185a (1995) (indemnifying workers dismissed without good cause).

[69] V.I. CODE ANN. tit. 24, § 65 (1997) (protecting employees from wrongful discharge).

[70] *See* Summers, *supra* note 6, at 13 (noting state court decisions that have limited the employment-at-will doctrine).

[71] *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 892 (Mich. 1980) (holding that "employer statements of policy, such as [personnel manuals], can give rise to contractual rights in employees"); *see also* 9A Lab. Rel. Rep. (BNA) 505:51-52 (1997) (counting thirty-five states).

[72] *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 398 (Cal. 1988) (holding that an employee can maintain an action in contract on the basis that the employer breached the implied covenant of good faith and fair dealing); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977) (finding that a duty of good faith may be implied in contracts terminable at will); *see also* 9A Lab. Rel. Rep. (BNA) 505:51-52 (counting thirteen states); Gabriel S. Rosenthal, Note, *Crafting a New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks*, 71 WASH. L. REV. 1157, 1162 n.36 (1996) (listing cases).

[73] *See, e.g.*, Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101, 103-04 (2d Cir. 1985) (holding that enforcement of an oral employment agreement was not precluded by the statute of frauds).

[74] *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925-27 (Ct. App. 1981) ("[W]e hold that the longevity of the employee's service[, 32 years], together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge . . . without good cause.").

[75] *See* 9A Lab. Rel. Rep. (BNA) 505:51-52 (counting forty-three states and the District of Columbia).

[76] *See, e.g.*, Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1035 (Ariz. 1985) ("[T]ermination of employment for refusal to participate in public exposure of one's

ing a public duty.[78] Many states have also given employees tort actions for intentional infliction of emotional distress.[79]

The enforcement mechanism of these new rights varies. Many, such as those created by state common law doctrines, are enforced by private lawsuits filed by aggrieved employees. Others, such as the workplace safety standards of OSHA or the right to compensation for workplace injuries created by state workers' compensation statutes, are enforced exclusively by administrative agencies. The remainder, including the state and federal antidiscrimination statutes, are enforced by both administrative agencies and private rights of action.

These new minimum terms of employment are called "individual rights" because they do not depend on any form of collective employee action, such as a union, for their creation or enforcement.[80] In theory, these individual rights protect all employees regardless of union membership. In practice, however, the majority of these rights are denied to union members.[81]

---

buttocks is a termination contrary to the policy of this state [as expressed by the statute prohibiting indecent exposure] . . . ."); Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588, 592 (Minn. Ct. App. 1986) ("An employer's authority over its employee does not include the right to demand that the employee commit a criminal act."), *aff'd*, 408 N.W.2d 569 (Minn. 1987).

[77] *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (holding that a discharge in retaliation for filing a workers' compensation claim is actionable).

[78] *See, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876, 879-81 (Ill. 1981) (holding that discharge of an employee for reporting suspected criminal activity was contrary to public policy and gave rise to a claim in tort); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (holding employer liable for discharging plaintiff because she served jury duty).

[79] *See, e.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138, 1145-46 (5th Cir. 1991) (upholding a jury verdict finding the employer liable for intentional infliction of emotional distress where the employer's conduct rose to the level of being "so outrageous that civilized society should not tolerate it").

[80] For general discussions concerning individual rights, see Rabin, *supra* note 37, at 174-87 (discussing workplace rights in the 1990s); Summers, *supra* note 6, at 11-14 (outlining federal and state law regarding individual employment rights). *See also* Bales, *supra* note 6, at 1874-81 (arguing that because "unions have failed to achieve the minimal terms of employment that society has decided workers have the right to expect[,] Congress and state legislatures have . . . imposed external terms on employment relationships"); Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 421-27 (1994) (arguing that the increasing availability of tort law remedies to aggrieved employees serves to "undermine, not enhance the development of a coherent regulatory or legal regime designed to address the real needs of workers").

[81] *See infra* notes 296-303 and accompanying text.

II. DOCTRINAL SOURCES OF THE CONFLICT BETWEEN COLLECTIVE BARGAINING AND INDIVIDUAL EMPLOYMENT RIGHTS

Two legal doctrines effectively eviscerate most of the individual employment rights of union members. The first is the section 301 preemption doctrine, which erases many state common law rights and several state statutory rights. The second is the FAA arbitrability doctrine, which renders many of the unionized employee's remaining rights nugatory by drastically curtailing the remedies that an employee may receive when an employer violates those rights.

A. *Section 301 Preemption*

The section 301 preemption doctrine is an awful mess.[82] Because the law on section 301 preemption has been exhaustively canvassed elsewhere,[83] I

---

[82] For commentary agreeing with this assessment, see *Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991) (calling the section 301 preemption doctrine "one of the most confused areas of federal court litigation" (quoting Stephanie R. Marcus, Note, *The Need For a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 YALE L.J. 209, 209 (1989))); *Singh v. Estate of Lunalilo*, 779 F. Supp. 1265, 1268 (D. Haw. 1991) (noting the difficulty of reconciling the "dozens, if not hundreds, of federal cases addressing the issue of the scope of section 301 preemption on state law claims"); Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 BERKELEY J. EMPL. & LAB. L. 1, 17 (1996) ("[T]he Supreme Court's jurisprudence of section 301 preemption . . . has been very confused.").

[83] For recent articles discussing the section 301 preemption doctrine, see Mark L. Adams, *Struggling Through the Thicket: Section 301 and the Washington Supreme Court*, 15 BERKELEY J. EMP. & LAB. L. 106, 140 (1994) (arguing that the trend in the lower federal courts and in some state courts toward the expansion of section 301 preemption "den[ies] union employees the safeguards created by the state legislatures and courts . . . [thus potentially having] a detrimental impact on the ability of unions to recruit employees and to effectively bargain to protect their rights"); Todd Brower, *Towards a Unified Accommodation of State Law and Collective Bargaining Agreements: Federalism, Public Rights and Liberty of Contract*, 26 HOUS. L. REV. 389, 410-18 (1989) (examining the special federalism concerns inherent in a section 301 preemption case); Committee on Labor Arbitration and the Law of Collective Bargaining Agreements, *Labor Arbitration and the Law of Collective Bargaining Agreements*, 7 LAB. LAW. 747, 755-61 (1991) (discussing section 301 preemption after *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988)); Drummonds, *supra* note 42, at 581-82 (arguing that in place of the current section 301 doctrine, the Court should require that claims requiring interpretation of a collective bargaining agreement be submitted to the arbitrator *pendente lite* for resolution of contractual issues and then sent to state or federal court for resolution of its statutory elements); Angel Gomez III, *Preemption and Preclusion of Employee Common Law Rights by Federal and State Statutes*, 11 INDUS. REL. L.J. 45, 46 (1989) ("Federal law preemption and state law preclusion decisions have in recent years been a bane for lawyers representing employees, and often a boon for those representing management."); Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for* Lingle *and* Lueck, 66

will not attempt to provide a comprehensive survey here. Instead, I will simply sketch the doctrine sufficiently to illustrate how it significantly limits state law rights that otherwise would be available to unionized employees.

1. Supreme Court Doctrine

Section 301(a) of the LMRA provides that, "[s]uits for violations of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."[84] In *Textile Workers Union v. Lincoln Mills*

CHI.-KENT L. REV. 685, 749 (1990) (arguing that federal preemption of state employment law should be focused on protecting collective bargaining agreements from state encroachment); Anthony Herman, *Wrongful Discharge Actions After* Lueck *and* Metropolitan Life Insurance*: The Erosion of Individual Rights and Collective Strengths?*, 9 INDUS. REL. L.J. 596, 599 (1987) (arguing that, notwithstanding the existence of grievance and arbitration machinery in a collective bargaining agreement, there should be no preemption of state-created wrongful discharge actions); Jane Byeff Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance After* Lingle v. Norge Division of Magic Chef, Inc., 41 HASTINGS L.J. 1149, 1150 (1990) ("Allowing an employer's preemption defense to frame and dominate the question of whether an individual, unionized employee may bring a wrongful termination action ignores the troubling policy implications for organized labor that are raised by judicial recognition of wrongful discharge actions."); Daniel N. Kosanovich, *Inching Through the Maze: Recent Developments in Preemption Under the NLRA and the Impact of* Caterpillar, Hechler, *and Others*, 4 LAB. LAW. 225, 256 (1988) ("Further erosion of the preemption doctrine would not bode well for either the employer, the union, or individual employees in the long run."); Richard E. Schwartz & James E. Parrot, *A New Look at Federal Labor Law Preemption: Unionized Employees' Claims in State Court*, 7 ST. LOUIS U. PUB. L. REV. 297, 312 (1988) ("[C]are must be exercised by plaintiff's counsel to assert only state law claims truly independent of the collective bargaining agreement lest one plead into a preemption/mandatory arbitration defense."); Stein, *supra* note 82, at 17 ("Rather than selecting from the current [section 301 preemption] tests or using some combination, the Court should abandon them all and instead should preempt only state contract law that would otherwise govern the enforcement and interpretation of collective bargaining agreements."); Stone, *supra* note 6, at 644 (1992) (arguing that "an unnecessarily broad § 301 preemption doctrine" has caused "unions [to] decline[ ] in numbers and in political power, endangering collective as well as individual employment rights"); Rebecca Hanner White, *Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377, 434 (1990) (arguing that a proper interpretation of the Court's section 301 preemption decisions requires preemption of state law claims that are "both nonnegotiable and capable of resolution without interpretation of the contract," otherwise, "unionized workers [would be] free to sidestep the exclusivity of union representation and the primacy of the collective bargaining agreement"); Geri J. Yonover, *Preemption of State Tort Remedies for Wrongful Discharge in the Aftermath of* Lingle v. Norge*: Wholly Independent or Inextricably Intertwined?*, 34 S.D. L. REV. 63, 100 (1989) (arguing that in order to avoid the inconsistent results obtained under the section 301 preemption doctrine, Congress should enact "a federal statute which would prohibit generally unjust dismissals").

[84] 29 U.S.C. § 185(a) (1994).

of Alabama,[85] the Supreme Court held that section 301 authorized federal courts to develop a uniform body of substantive law for the interpretation and enforcement of collective bargaining agreements.[86] The Court reasoned that a contrary result would undermine the LMRA,[87] the purpose of which was to encourage and provide means for the enforcement of agreements to arbitrate.[88]

Stating that a uniform body of federal law was essential to promote industrial peace, the Court held in *Local 174, Teamsters v. Lucas Flour Co.*[89] that the Supremacy Clause[90] required this body of federal law to displace any state law regarding the interpretation and enforcement of labor contracts.[91] Otherwise, the Court reasoned, varying interpretations of the terms of a collective bargaining agreement under various state laws would disrupt the negotiation and administration of labor contracts:

> 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. . . . [T]he process of negotiating an agreement would be made immeasurably 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. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.[92]

In *Avco Corp. v. Aero Lodge No. 735*,[93] the Supreme Court considered whether section 301 preemption could provide the basis for removal jurisdiction under 28 U.S.C. § 1441, which provides for removal of cases in which federal courts have original jurisdiction. The Court held that section 301 preemption was so expansive that claims based exclusively on state contract law not only were preempted, but also became from their inception federal question claims.[94] As the Court explained in *Franchise Tax Board v. Construction Laborers Vacation Trust*,[95] such claims may be removed to federal court

---

[85] 353 U.S. 448 (1957).

[86] *See id.* at 456-57.

[87] *See id.* at 456.

[88] *See id.* at 455.

[89] 369 U.S. 95 (1962).

[90] U.S. CONST. art. VI, cl. 2.

[91] *See Lucas Flour*, 369 U.S. at 102-04.

[92] *Id.* at 103-04.

[93] 390 U.S. 557 (1968).

[94] *See id.* at 560-62.

[95] 463 U.S. 1 (1983).

under § 1441, even if alternative causes of action are pleaded in the complaint. This is so even though removal jurisdiction typically is unavailable pursuant to the "well pleaded complaint rule" that denies federal jurisdiction to cases in which a federal question, such as section 301 preemption, is raised only as a defense.[96] The *Franchise Tax Board* Court called this "complete preemption" doctrine "an independent corollary of the well pleaded complaint rule . . . ."[97]

Although *Avco* made it clear that state law claims alleging the breach of a collective bargaining agreement were preempted under section 301, the issue remained as to whether section 301 completely preempted any state law claims beyond those that expressly alleged such a breach, such as state law tort claims. The Supreme Court addressed this issue in *Allis-Chalmers Corp. v. Lueck*.[98] In *Allis-Chalmers*, an employee sued his employer under a Wisconsin law defining as a tort the bad faith handling of an insurance claim.[99] The test for preemption, the Court stated, was whether "resolution of a state-law claim is substantially dependent upon analysis of the terms of" a collective bargaining agreement.[100] Reasoning that the agreement at issue in *Allis-Chalmers* might contain implied terms that defined the employer's duty to pay insurance benefits, the Court found that the employee's claim was preempted because the "duties imposed and rights established through the state tort thus derive[d] from the rights and obligations established by the contract."[101] Because the tort claim was "inextricably intertwined with consideration of the terms of the labor contract," the claim was preempted even though it was superficially labeled as a tort claim rather than breach of contract.[102] Limiting complete preemption to formally alleged breach of contract claims 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."[103] Thus, after *Allis-Chalmers*, it became clear that section 301 preemption would extend not only to state law contract claims, but also to certain state law tort claims.[104]

---

[96] *See id.* at 23-24 ("[I]f a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.").

[97] *Id.* at 22.

[98] 471 U.S. 202 (1985).

[99] *See id.* at 203.

[100] *Id.* at 220.

[101] *Id.* at 217.

[102] *Id.* at 213.

[103] *Id.* at 211.

[104] *See, e.g.*, International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 861-62 (1987) (holding that section 301 preempts an employee's claim that his union breached its duty of care to ensure the safety of the workplace because the claim is substantially dependent on whether, under the collective bargaining agreement, the union had assumed

Nevertheless, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . ."[105] In *Caterpillar Inc. v. Williams*,[106] the Court held that section 301 did not preempt a state *contract* lawsuit, thus preventing removal to federal court.[107] Plaintiff union members had alleged that their employer breached individual oral employment agreements promising them "indefinite and lasting employment" and that those agreements pre-dated their joining the union.[108] The plaintiffs in *Caterpillar* had been nonunion employees of the company at the time the initial promises allegedly were made.[109] They were later demoted to bargaining unit positions, but alleged that they were promised that the demotions were temporary.[110] Plaintiffs subsequently were laid off from their bargaining unit positions and brought suit in state court alleging that their employer had breached the oral agreements in violation of state contract law.[111] The Supreme Court, applying the *Allis-Chalmers* test, upheld the plaintiffs' right to bring a state contract claim, finding that their "complaint is not substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement."[112]

Furthermore, the *Caterpillar* Court held that the fact that as part of a defense to a state law contract claim, an employer might raise "a federal question, even a § 301 question," does not mean that the claim is preempted by section 301.[113] The preemption of state law engendered by section 301 is occasioned only when the claim raised "on the face of the complaint" substantially depends on interpretation of a collective bargaining agreement for its resolution.[114] Unfortunately, the Court did not explain why the employer's defense in *Allis-Chalmers* met this test while in *Caterpillar* it did not.[115]

---

this duty); Berda v. CBS Inc., 881 F.2d 20, 27 (3d Cir. 1989) (noting that a tort claim will be preempted if any of its *prima facie* elements require interpretation of the collective bargaining agreement).

[105] *Allis-Chalmers*, 471 U.S. at 211.

[106] 482 U.S. 386 (1987).

[107] *See id.* at 398-99.

[108] *Id.* at 388.

[109] *See id.* at 388-89.

[110] *See id.* at 389.

[111] *See id.* at 389-90.

[112] *Id.* at 395.

[113] *Id.* at 398.

[114] *Id.* at 398-99.

[115] *See* Stein, *supra* note 82, at 13 ("Contrary to the complete preemption doctrine as previously understood, *Caterpillar* held that in some cases a section 301 preemption defense cannot serve as a basis for removal jurisdiction."); Stone, *supra* note 6, at 601

In *Lingle v. Norge Division of Magic Chef, Inc.*,[116] the Court held that section 301 did not preempt a state tort claim for retaliatory discharge, even though the collective bargaining agreement provided for arbitral resolution of an employee's claim that she was fired without just cause.[117] The Court reasoned that in order to prevail on her retaliatory discharge claim, the employee need not ask a court to interpret the collective bargaining agreement.[118] Thus, the Court found that:

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.[119]

Although *Caterpillar* and *Lingle* might appear to signal a retreat from the broad preemption doctrine articulated in *Avco* and *Allis-Chalmers*,[120] several commentators have predicted the continued expansion of the doctrine.[121] This prediction is premised on the *Lingle* Court's subtle but arguably significant shift in the way that it articulated the test for section 301 preemption.

("Unfortunately, the Court did not explain why the employer's argument in *Caterpillar* . . . was a mere defense, while in *Allis-Chalmers*, the employer's argument that the collective agreement limited or qualified its obligation to pay medical insurance preempted the plaintiff's claim.").

[116] 486 U.S. 399 (1988).

[117] *See id.* at 407.

[118] *See id.*

[119] *Id.* at 409-10.

[120] *See* White, *supra* note 83, at 415 ("[T]he lower courts continue to struggle with section 301 preemption. While [*Allis-Chalmers*] initially prompted a sweeping view of preemption, the *Caterpillar* and *Lingle* decisions have resulted in a more restrictive approach that is often inconsistent with a proper analysis and application of the Supreme Court decisions."); *see also* John E. Gardner, Note, *Federal Labor Law Preemption of State Wrongful Discharge Claims*, 58 U. CIN. L. REV. 491, 526-27 (1989) ("*Lingle* . . . clearly opened the door through which unionized employees can bring . . . claims apart from or in addition to any grievance and arbitration hearing . . . . The question of how wide the door has been opened, however, has not yet been answered."); Robert P. Lane, Jr., Note, *Labor Law Preemption Under Section 301: New Rules for an Old Game*, 40 SYRACUSE L. REV. 1279, 1292 (1989) (arguing that "*Lingle* . . . properly limit[ed] the preemptive reach of federal labor law to disputes that require a pronouncement as to the meaning of the terms of a collective bargaining agreement").

[121] *See, e.g.*, Committee on Labor Arbitration and the Law of Collective Bargaining Agreement, *supra* note 83, at 755 (stating that there is "a great deal of room for courts to find preemption wherever they want to find it"); Stone, *supra* note 6, at 604 (noting the possibility that the *Lingle* test may "result in more preemption than did either *Allis-Chalmers* or *Caterpillar*"); Marcus, *supra* note 82, at 209 ("Although the [*Lingle*] Court held that the plaintiff's state law claim was not preempted, its language potentially broadened section 301's preemptive power.").

Whereas *Allis-Chalmers* only preempted claims that were "substantially dependent" on the collective bargaining agreement, the *Lingle* Court concluded that "an application of state law is preempted by section 301 . . . only if such application requires the interpretation of a collective-bargaining agreement."[122] It is possible, therefore, that by dropping the word "substantial" from the dependence test, the Court intended to broaden the test for preemption. The word "substantial" reappeared, however, in a *Lingle* footnote[123] and again in a later opinion.[124] The precise formulation of the test, therefore, is less than clear. The Court's most recent section 301 opinions—both decided during the 1994 Term—do little to clarify the test.[125]

The first, *Livadas v. Bradshaw*,[126] presented the issue of whether the California Commissioner of Labor's policy of pursuing late wage payment claims of nonunion employees while refusing to pursue such claims of unionized employees was compelled by the section 301 preemption doctrine. The Commissioner, defending the policy, argued that determining what a unionized employee was owed necessarily would involve interpreting the applicable collective bargaining agreement. The Court disagreed, stating that this argument was not colorable, and that it was "clear beyond peradventure" that the unionized employee's wage claims were not preempted.[127] In a footnote, the Court noted the confusion among the circuit courts as to the proper breadth of section 301 preemption, but stated that this case was "not a fit occasion for us to resolve disagreements that have arisen over the proper scope of our earlier decisions."[128]

Finally, in *Hawaiian Airlines, Inc. v. Norris*,[129] the Court revisited the

---

[122] *Lingle*, 486 U.S. at 413.

[123] *See id.* at 410 n.10 (quoting *Caterpillar*, 482 U.S. at 394-95 (quoting International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 858 n.3 (1987))).

[124] *See* United Steelworkers v. Rawson, 495 U.S. 362, 366-67 (1990).

[125] For discussion of these cases, see Joseph R. Grodin, *Report on the 1993-1994 Supreme Court Labor and Employment Law Term*, 10 LAB. LAW. 693, 704-05 (1994) ("[M]any read . . . *Gilmer* . . . as signaling the death of *Alexander* [as well as] a judicial enthusiasm for pushing and shoving all disputes out of court and into arbitration. [*Norris*] along with *Livadas* suggests that the Court is distancing itself from that current."); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1028 (1996) ("Despite some constriction of the lower courts' use of preemption since the *Livadas* and [*Norris*] decisions, courts nonetheless stretch to find unionized workers' state law claims preempted.").

[126] 512 U.S. 107 (1994).

[127] *Id.* at 124 n.18; *see also id.* at 124 (stating that "the primary text for deciding whether Livadas was entitled to a penalty was not the Food Store Contract, but a calendar").

[128] *Id.* at 124 n.18.

[129] 512 U.S. 246 (1994).

preemption issue, this time under the guise of the Railway Labor Act[130] rather than section 301.[131] In *Norris*, an airline fired one of its mechanics for refusing to certify a repair that he believed to be unsafe and for so notifying the Federal Aviation Authority.[132] The employee responded by filing state whistleblower and common law claims.[133] The Court characterized the facts of *Norris* as "remarkably similar" to those of *Lingle*[134] and stated that in both cases, the state law retaliation claim turned on a "purely factual question: whether the employee was discharged . . . and, if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of [state law] rights . . . ."[135] Citing *Lingle*, the Court held that state law claims are preempted whenever the claims are "dependent on the interpretation of a [collective bargaining agreement],"[136] and held that in *Norris*, as in *Lingle*, the claims were not preempted.[137]

2. Application in the Lower Federal Courts

Despite this uncertainty as to how the section 301 preemption test should be articulated, preemption cases decided in the lower federal courts nonetheless are capable of categorization. The decisions today break down much like they did when Professor Katherine Van Wezel Stone surveyed the cases in 1992.[138]

Claims that are generally preempted include:

1. Breach of an implied contractual covenant of good faith and fair dealing;[139]

---

[130] 45 U.S.C. §§ 151-188 (1994).

[131] The Court noted that the preemption standard under the Railway Labor Act was "virtually identical" to the section 301 preemption standard. *See Norris*, 512 U.S. at 260; *see also id.* at 263 ("[W]e conclude that *Lingle* provides an appropriate framework for addressing preemption under the RLA, and we adopt the *Lingle* standard to resolve claims of RLA pre-emption.").

[132] *See id.* at 249.

[133] *See id.* at 250.

[134] *Id.* at 261. In *Lingle*, the employee was fired for filing a workers' compensation claim. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 401 (1988).

[135] *Norris*, 512 U.S. at 262.

[136] *Id.*

[137] *See id.* at 266.

[138] *See* Stone, *supra* note 6, at 607-16 (discussing categories of claims that are or are not generally subject to preemption).

[139] *See, e.g.*, Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 599 (9th Cir. 1996) (preempting a claim for breach of covenant of good faith and fair dealing because it was an implied term of a collective bargaining agreement); Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 529 (10th Cir. 1992) (preempting employees' claims that employer's investigation into suspected theft and drug abuse was baseless and illegal); Fox v. Parker Hannifin Corp., 914 F.2d 795, 801 (6th Cir. 1990) (preempting employee's state tort law claim alleging that the company and the union engaged in "fraudulent malfeasance

2. The tort of wrongful discharge;[140]
3. Unlawful drug testing;[141]
4. Breach of a promise to an employee who is a member of a bargaining unit;[142]

---

of collective bargaining agreement obligations"); Holmes v. National Football League, 939 F. Supp. 517, 527 (N.D. Tex. 1996) (preempting a claim for breach of implied covenant of good faith and fair dealing because it required the court to analyze the collective bargaining agreement).

[140] *See, e.g.*, Quesnel v. Prudential Ins. Co., 66 F.3d 8, 11-12 (1st Cir. 1995) (preempting claim where employee was allegedly terminated to deny him his commissions); Thomas v. LTV Corp., 39 F.3d 611, 621 (5th Cir. 1994) (preempting claim where employee was terminated for filing workers' compensation claim); Hanks v. General Motors Corp., 859 F.2d 67, 69 (8th Cir. 1988) (holding that assessment of a claim for wrongful discharge arising from employee's refusal to return to work under the same supervisor who had sexually molested the employee's daughter required reference to the collective bargaining agreement and thus was preempted); Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 256 (4th Cir. 1987) (preempting claim arising out of employee's termination for refusing to submit to employer's search of his automobile for illegal drugs); Durrette v. UGI Corp., 674 F. Supp. 1139, 1143 (M.D. Pa. 1987) (preempting claim arising over termination for insubordination when employee refused to sign a document relating to the employee's unexcused absences, action that was allegedly taken in an attempt to chill the employee's efforts to seek medical attention for work related injuries).

[141] *See, e.g.*, Schlacter-Jones v. General Tel. of Cal., 936 F.2d 435, 440-42 (9th Cir. 1990) (preempting employee's state tort claims because employer's drug testing policy could not be assessed without reference to the collective bargaining agreement); Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 118-20 (1st Cir. 1988) (preempting claims of wrongful discharge and invasion of privacy arising out of employer's making submission to drug testing a condition of employment); Strachan v. Union Oil Co., 768 F.2d 703, 705 (5th Cir. 1985) (holding that the availability of grievance procedures under collective bargaining agreement required preemption of employee's state tort claims); Jobes v. Tokheim Corp., 657 N.E.2d 145, 149 (Ind. Ct. App. 1995) (preempting claim arising out of employer's instruction to doctor to test employee's blood for illegal drugs while employee was being treated by doctor for on-the-job injury).

[142] These claims generally are preempted whether the plaintiff pleads breach of contract, misrepresentation, promissory fraud, or promissory estoppel. *See, e.g.*, Beals v. Kiewit Pac. Co., 114 F.3d 892, 894-95 (9th Cir. 1997) (preempting contract claim based on breach of promise to pay higher wages than those provided for by the collective bargaining agreement, but not preempting plaintiff's negligent misrepresentation claim); Angst v. Mack Trucks, Inc., 969 F.2d 1530, 1537 (3d Cir. 1992) (preempting claim alleging breach of a buy out plan that promised employees a lump sum payment and a year of continued benefits in exchange for their voluntary resignations); Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 662 (7th Cir. 1992) (preempting claims based on employer's promise to guarantee the terms of collective bargaining agreement as well as promise to rehire in the event that independent distributor terminated plaintiffs' employment); Dougherty v. AT&T Co., 902 F.2d 201, 204 (2d Cir. 1990) (preempting claims of fraud and negligent misrepresentation, based on broken promise of job security, because claims were not independent of collective bargaining agreement); Fox v. Parker Hannifin

5. Defamation;[143]
6. Unlawful searches;[144] and

Corp., 914 F.2d 795, 801-02 (6th Cir. 1990) (preempting claim arising out of promise to investigate harassment by co-workers); Bache v. AT&T, 840 F.2d 283, 285-86 & n.1 (5th Cir. 1988) (preempting claims for breach of contract and fraudulent misrepresentation based on promise of job security); Mason v. Continental Group, Inc., 763 F.2d 1219, 1224 (11th Cir. 1985) (preempting employees' state law claims for breach of contract, fraud, and breach of fiduciary duty because claims were subject to collective bargaining agreement); Hill v. Ralphs Grocery Co., 896 F. Supp. 1492, 1497-98 (C.D. Cal. 1995) (preempting state law claim based on promise of job security and severance pay in case of plant closure); Cullen v. E.H. Friedrich Co., 910 F. Supp. 815, 824-25 (D. Mass. 1995) (preempting promissory estoppel claim, based on language contained in written warning, because claim was "inextricably intertwined with . . . the grievance arbitration and just cause provision of the collective bargaining agreement"). *But see* Wells v. General Motors Corp., 881 F.2d 166, 174-75 (5th Cir. 1989) (finding no preemption of fraud and misrepresentation claims based on promise that laid-off employees would be eligible for rehiring).

[143] *See, e.g.*, Luecke v. Schnucks Markets, Inc., 85 F.3d 356, 359-62 (8th Cir. 1996) (preempting defamation claim based on employer's statements to others that employee had refused to take drug test); DeCoe v. General Motors Corp., 32 F.3d 212, 217 (6th Cir. 1994) (preempting defamation claim, based on allegations that plaintiff employee had sexually harassed coworkers, because the collective bargaining agreement subjected harassment claims to grievance procedures); Bagby v. General Motors Corp., 976 F.2d 919, 920-21 (5th Cir. 1992) (preempting defamation suit, based on employee's being suspended and escorted out of the factory, because employer's actions were taken pursuant to terms of collective bargaining agreement); Mitchell v. Pepsi-Cola Bottlers Inc., 772 F.2d 342, 348 n.2 (7th Cir. 1985) ("If plaintiff could not prove that defendant's agents made the accusations with . . . 'actual malice' the claim would likely be preempted by federal labor law."); Furillo v. Dana Corp. Parish Div., 866 F. Supp. 842, 852 (E.D. Pa. 1994) (holding that determination of whether employee was defamed during course of disciplinary proceedings required reference to collective bargaining agreement, thus preempting employee's claim); Mayne v. B. Green & Co., No. CIV.A.HAR92-431, 1992 WL 356122, at *3 (D. Md. Nov. 20, 1992) (preempting claim arising because employer made known to third persons accusation that employee had used illegal drugs). *But see* Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536, 538 (9th Cir. 1987) (holding that because employer's defamatory statements concerning employee were not governed by collective bargaining agreement, employee's defamation claim was not preempted); Meier v. Hamilton Standard Elec. Sys., Inc., 748 F. Supp. 296, 299-300 (E.D. Pa. 1990) (holding that claim based on defamatory statements fell outside the scope of the collective bargaining agreement and thus was not preempted).

[144] *See, e.g.*, Stikes v. Chevron USA, Inc., 914 F.2d 1265, 1269-70 (9th Cir. 1990) (preempting claim arising out of search of employee's private vehicle as part of safety program); Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 256 (4th Cir. 1987) (search of person and automobile); Sweigart v. Delmotte, No. CIV.A.94-7235, 1994 WL 724987, at *3 (E.D. Pa. Dec. 29, 1994) (preempting claim arising from supervisors peering through cracks and under door of bathroom stall being used by employee), *aff'd*, 74 F.3d 1228 (3d Cir. 1995); Romero v. Hilton Hotels Corp., No. CIV.90-00152ACK, 1991 WL

7. The mishandling of health insurance, medical leave, or other medical obligations.[145]

Claims that are seldom preempted include:

1. Retaliation for filing a workers' compensation claim;[146]
2. Breach of a promise made to an employee *before* the employee entered the bargaining unit;[147] and

---

340574, at *3-4 (D. Haw. June 3, 1991) (search of person).

[145] *See, e.g.*, Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1088 (9th Cir. 1991) (preempting claims that arose out of employer's refusal to reassign employee to light duty during pregnancy and forcing her to take medical leave); Terwilliger v. Greyhound Lines, Inc., 882 F.2d 1033, 1037-38 (6th Cir. 1989) (preempting claims based on a contractual right to reemployment after medical disqualification); Thankachen v. Cardone Indus., No. CIV.A.95-181, 1995 WL 580342, at *3 (E.D. Pa. Sept. 28, 1995) (holding that claim arising out of employee's discharge after she took scheduled vacation and leave of absence to care for her ailing mother was not preempted); Horne v. Southern Bell Tel. & Tel. Co., 793 F. Supp. 315, 317 (S.D. Fla. 1992) (preempting invasion of privacy claim based on employer's policy of requiring employees to submit to psychiatric examinations under threat of termination or disciplinary action), *aff'd*, 63 F.3d 1112 (11th Cir. 1995).

[146] Since *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), courts have uniformly refused to preempt claims alleging retaliation for filing workers' compensation claims. *See, e.g.*, Humphrey v. Sequentia, Inc., 58 F.3d 1238, 1244 (8th Cir. 1995) (declining to preempt retaliatory discharge claim based on violation of Missouri's workers' compensation law); Jones v. Roadway Express, Inc., 931 F.2d 1086, 1090 (5th Cir. 1991) (holding that claim alleging discharge in retaliation for filing for workers' compensation benefits was not preempted); Krashna v. Oliver Realty, Inc., 895 F.2d 111, 115 (3d Cir. 1990) (finding no preemption because employee "expressly sought vindication of interests independent of those embodied in the collective bargaining agreement"); Eldridge v. Felec Servs., Inc., 920 F.2d 1434, 1436 (9th Cir. 1990) (refusing to preempt claim of retaliatory discharge based on employee's filing for workers' compensation). *But see* Martin v. Shaw's Supermarkets, Inc., 105 F.3d 40, 44-45 (lst Cir. 1997) (preempting workers' compensation retaliation claim because state statute subjected such claims to terms of collective bargaining agreements).

[147] In *Caterpillar*, the Court revisited its decision in *J.I. Case Co. v. NLRB*. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 396 (1987) (discussing J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)). *J.I. Case* considered the issue of whether an employer could have separate individual agreements with unionized employees or whether such agreements were subsumed by the collective bargaining agreement, having no independent legal effect. *See J.I. Case*, 321 U.S. at 334-35. The *J.I. Case* Court held that employers and employees could not maintain individual agreements that give an employee less than the employees would be given under the collective agreement. *See id.* at 336. To this end, the Court stated that:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337.

J.I. Case did not, however, adopt a blanket rule prohibiting individual contracts with bargaining unit members. The Court stated that employers and employees may enter individual contracts that "embody matters that are not necessarily included within the statutory scope of collective bargaining," to the extent that such contracts are "not inconsistent with a collective agreement or [do] not amount to or result from or [are] not part of an unfair labor practice." *Id.* at 339. The *J.I. Case* Court did not hold that individual contracts that are *more* advantageous to the employee than the collective agreement are subsumed by the collective agreement. Although acknowledging that such individual contracts can be disruptive of industrial peace, the Court declared that:

> Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

Id.

Relying on this language from *J.I. Case*, the *Caterpillar* Court rejected the employer's claim that the collective bargaining agreement subsumed the employees' earlier oral contracts for long-term employment, which had given employees more rights than the subsequent collective agreement. *See Caterpillar*, 482 U.S. at 396. The Court stated that "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law." *Id.* The Court explained that the employer's basic error was "its failure to recognize that [an employee] covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement." *Id.*

Prior to *Caterpillar*, the Ninth Circuit held that state fraudulent misrepresentation claims arising from alleged pre-employment misrepresentations are preempted by section 301. *See* Bale v. General Tel. Co. of Cal., 795 F.2d 775, 779-80 (9th Cir. 1986). In that case, discharged employees brought claims of fraud, negligent misrepresentation, and breach of contract, all based on alleged pre-employment promises of job security, against their former employer after they were "bumped" from their jobs to make room for employees on a preferential hiring list created by a collective bargaining agreement. *See id.* at 777. Plaintiffs concurrently brought a section 301 claim for breach of a collective bargaining agreement. *See id.* The court held that the state law claims were preempted, both because they were "substantially dependent" on the collective bargaining agreement, and because they "'arose out of the same acts and conduct which formed the basis of' [plaintiffs'] section 301 claim." *Id.* at 780 (quoting Carter v. Smith Food King, 765 F.2d 916, 921 (9th Cir. 1985)).

Since *Caterpillar*, however, virtually every lower federal court considering the issue has held that pre-collective bargaining agreement assurances of job security are not preempted by section 301. *See, e.g.*, Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 231-32 (3d Cir. 1995) (holding that claim arising out of employer's written promise of job security made on eve of decertification election was not preempted); White v. National Steel Corp., 938 F.2d 474, 482-83 (4th Cir. 1991) (declining to preempt claims brought by discharged employees who had accepted management positions not covered by collective bargaining agreement on the strength of promises of job security, including the right to return to their former bargaining unit positions); Berda v. CBS Inc., 881 F.2d 20, 25-27 (3d Cir.

3. Discrimination on the basis of race, age, gender, disability, or other statutorily protected classification.[148]

Claims that sometimes are preempted include:

1. Claims concerning issues that were not addressed by the collective bargaining agreement, and thus cannot be brought in arbitration;[149]

1989) (refusing to preempt claim based on pre-hire promise of job security); Wells v. General Motors Corp., 881 F.2d 166, 174-75 (5th Cir. 1989) (finding no preemption where employer had fraudulently induced plaintiffs to accept a buyout plan by telling them that they would be considered for rehire if new jobs were created). Some pre-*Caterpillar* cases reached the same decision. *See, e.g.*, Anderson v. Ford Motor Co., 803 F.2d 953, 958-59 (8th Cir. 1986) (finding no preemption where employer had promised that newly hired employees would not be bumped by employees on preferential hiring list); Varnum v. Nu-Car Carriers, Inc., 804 F.2d 638, 640 (11th Cir. 1986) (finding no preemption of fraud and misrepresentation claims where employer failed to tell new applicant that it was renegotiating the collective bargaining agreement so that new hires were to receive little or no work).

If the preexisting contract cannot be specifically enforced because it is in direct conflict with a collective bargaining agreement, a plaintiff is still free to bring a claim for damages against the employer for breach of contract. *See* Belknap, Inc. v. Hale, 463 U.S. 491, 512 (1983) (permitting "permanent replacements" to sue the company for breach of contract after they were discharged to make room for strikers who were recalled pursuant to a settlement).

[148] *See, e.g.*, Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1524-25 (9th Cir. 1995) (declining to preempt discrimination claim based on physical disability); Milton v. Scrivner, Inc., 53 F.3d 1118, 1121 (10th Cir. 1995) (violation of Americans with Disabilities Act); Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 749 (9th Cir. 1993) (national origin discrimination); Cook v. Lindsay Olive Growers, 911 F.2d 233, 238 (9th Cir. 1990) (religious discrimination); Smolarek v. Chrysler Corp., 879 F.2d 1326, 1332-33 (6th Cir. 1989) (disability discrimination); Pelech v. Klaff-Joss, LP, 828 F. Supp. 525, 531 (N.D. Ill. 1993) (sex discrimination); Austin v. New England Tel. & Tel. Co., 644 F. Supp. 763, 767 (D. Mass. 1986) (disability discrimination); Lewis v. Aalfs Mfg., Inc., 489 N.W.2d 47, 49 (Iowa Ct. App. 1992) (disability discrimination); Commodore v. University Mechanical Contractors, Inc., 839 P.2d 314, 320 (Wash. 1992) (en banc) (racial discrimination).

[149] Many cases have not preempted these claims. *See, e.g.*, Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1524 (9th Cir. 1995) (finding no preemption where the collective bargaining agreement provided no framework for "job modification, or for the transfer or termination of unfit employees" and where there was "no general provision prohibiting discrimination based on physical disability"); Wells v. General Motors Corp., 881 F.2d 166, 174-75 (5th Cir. 1989) (declining to preempt fraud claim); Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536, 538 (9th Cir. 1987) (declining to preempt defamation claim); Weatherholt v. Meijer Inc., 922 F. Supp. 1227, 1231-32 (E.D. Mich. 1996) (refusing to preempt false imprisonment claim); McKiernan v. Smith-Edwards-Dunlap Co., 66 Empl. Prac. Dec. (CCH) ¶ 43,686 (E.D. Pa. 1995) (finding no preemption where employer had agreed to grant a leave of absence in excess of maximum of 30 days provided for by the collective bargaining agreement and the twelve week period provided for by the FMLA could still be construed as running when employee was discharged); Meier v. Hamilton

2. Intentional infliction of emotional distress ("IIED");[150] and

---

Standard Elec. Sys., Inc., 748 F. Supp. 296, 300 (E.D. Pa. 1990) (holding that employee's claims for defamation, intentional infliction of emotional distress, and invasion of privacy were not preempted because grievance procedure under collective bargaining agreement could not redress such wrongs); Foster v. Albertsons, Inc., 835 P.2d 720, 727 (Mont. 1992) (holding that retaliatory discharge claim arising out of sexual harassment by employee was not preempted where factual inquiry did not turn on the meaning of collective bargaining agreement); Miller Brewing Co. v. Department of Indus., Labor & Human Relations, 553 N.W.2d 837, 840-41 (Wis. Ct. App. 1996) (finding no preemption where court did not need to interpret collective bargaining agreement provision providing for reserve paid sick leave because claim was based solely on employee's statutory right to substitute paid sick leave for unpaid family leave).

Other courts, however, have preempted these claims. *See, e.g.*, Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 997 (9th Cir. 1987) ("The subject matter of [plaintiff's] contract, . . . is a job position covered by the CBA. Because any 'independent agreement of employment concerning that job position could be effective only as part of the collective bargaining agreement,' the CBA controls and the contract claim is preempted." (quoting Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984))); Truex v. Garrett Freightlines, Inc., 784 F.2d 1347, 1351 (9th Cir. 1985) ("[Appellants argue] that the [employer's] campaign of harassment is sufficiently outrageous that it satisfies . . . the *Farmer* exception [to preemption] even if regulated by the collective bargaining agreements . . . . [This] argument does not advance their cause in light of this court's narrow construction of the 'substantially abusive manner' exception . . . ." (citing Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 305 (1977))); Char v. Matson Terminals, Inc., 817 F. Supp. 850, 858 (D. Haw. 1992) (holding that claim of negligence in investigation of employee's grievance was preempted where claim was founded upon rights created by collective bargaining agreement); Honchell v. General Elec. Co., 654 N.E.2d 402, 404-05 (Ohio Ct. App. 1995) (holding that right to sue employer for intentional tort arises from state law, not collective bargaining agreement, but where court must view employer's acts in light of requirements of return-to-work provision of collective bargaining agreement, claim was preempted).

[150] *See, e.g.*, Baker v. Farmers Elec. Coop., Inc., 34 F.3d 274, 281 (5th Cir. 1994) ("[W]here the allegedly tortious conduct could not have been sanctioned by the CBA, . . . no preemption occurs. Where the conduct may reasonably be deemed covered by the CBA, however, . . . section 301 does preempt state tort claims."); Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1088 (9th Cir. 1991) (affirming preemption insofar as plaintiff's IIED claim was based on the employer's refusal to provide light duty, a matter requiring interpretation of the collective bargaining agreement, but reversing a finding of preemption to the extent that plaintiffs claim was based on the employer's outrageous comments and remarks, a factual inquiry not dependent on interpretation of the agreement); McCormick v. AT&T Techs., Inc., 934 F.2d 531, 546 n.4 (4th Cir. 1991) (Phillips, J., dissenting) (noting that IIED claims are sometimes preempted and sometimes not); Johnson v. Beatrice Foods Co., 921 F.2d 1015, 1021 (10th Cir. 1990) (noting that circuits have reached "varying results" on the question of whether to preempt IIED claims).

Many courts have held that such claims are preempted. *See, e.g.*, Baker v. Farmers Elec. Coop., Inc., 34 F.3d 274, 282 (5th Cir. 1994) (preempting IIED claim arising from

retaliatory discharge for exercising rights granted under the CBA); Burgos v. Southwestern Bell Tel. Co., 20 F.3d 633, 636 (5th Cir. 1994) (holding that analysis of collective bargaining agreement was necessary to judgment on the merits of plaintiff's IIED claim, thus claim was preempted); DeCoe v. General Motors Corp., 32 F.3d 212, 220 (6th Cir. 1994) (preempting IIED claims where they arose from coworkers' allegations of sexual harassment); McCormick v. AT&T Techs., Inc., 934 F.2d 531, 536-37 (4th Cir. 1991) (preempting IIED claim for actions taken by employer after terminating employee); Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250, 1256 (5th Cir. 1990) ("[A]llegedly improper labor practices cannot themselves constitute the 'outrageous conduct' necessary to establish the tort of [IIED]." (citing Farmer v. United Bhd. of Carpenters, 430 U.S. 290, 305 (1977))); Cook v. Lindsay Olive Growers, 911 F.2d 233, 239-40 (9th Cir. 1990) (preempting IIED claim arising out of employer's refusal to accommodate employee's observance of a Friday evening Sabbath); Johnson v. Beatrice Foods Co., 921 F.2d 1015, 1021 (10th Cir. 1990) (preempting IIED claim that arose out of supervisor's alleged harassment of employee); Douglas v. American Info. Techs. Corp., 877 F.2d 565, 573 (7th Cir. 1989) (finding preemption because plaintiff's IIED claim was based on "allegedly wrongful acts directly related to the terms and conditions of . . . employment"); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1149-50 (9th Cir. 1988) (preempting IIED claim arising out of employer's allegation that employee had misappropriated funds); Willis v. Reynolds Metals Co., 840 F.2d 254, 255 (4th Cir. 1988) (preempting IIED claim based on acts taken by the employer that "directly dealt with its right pursuant to a collective bargaining agreement to conduct investigations into possible harassment of one employee by a co-worker"); Truex v. Garrett Freightlines, Inc., 784 F.2d 1347, 1350-51 (9th Cir. 1985) (preempting IIED claims that were "in essence claims that administration of discipline was improper under the standards set by the collective bargaining agreements"); Weatherholt v. Meijer, Inc., 922 F. Supp. 1227, 1233 (E.D. Mich. 1996) (preempting IIED claim arising from false imprisonment because proof of an essential element of plaintiff's claim required interpretation of CBA); Crenshaw v. Georgia-Pacific Corp., 915 F. Supp. 93, 101 (W.D. Ark. 1995) (preempting IIED claim arising from allegation of theft); Ellis v. Lloyd, 838 F. Supp. 704, 709 (D. Conn. 1993) (preempting IIED claim brought by a supervisory employee against a union for allegedly filing multiple grievances with the intent to harass).

Other courts, however, have not preempted such claims. *See, e.g.*, Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 232 (3d Cir. 1995) (finding no preemption where IIED claim arose from broken promise of job security because it did not require analysis of collective bargaining agreement); Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1089 (9th Cir. 1991) (finding no preemption of IIED claim based on discriminatory remarks because collective bargaining agreement set forth no standards for determining whether employer's conduct was outrageous); Hanks v. General Motors Corp., 906 F.2d 341, 345 (8th Cir. 1990) (finding no preemption of outrageous conduct and IIED claims because resolution of those claims did not require interpretation of collective bargaining agreement); Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536, 539 (9th Cir. 1987) (finding no preemption of IIED claim because disciplinary procedures provided for by collective bargaining agreement were vague and gave no guidance regarding employee's claim); Keehr v. Consolidated Freightways of Del., Inc., 825 F.2d 133, 137-38 & n.6 (7th Cir. 1987) (holding that emotional distress claim was not preempted because the claim "revolved around conduct by [the] employer that [was] not even arguably sanctioned by the labor contract"); Van Allen v. Bell Atlantic-Washington, D.C., Inc., 921 F. Supp.

3. Whistleblower or wrongful discharge in violation of public policy.[151]

There does not appear to be a principled reason why a given type of state law claim falls into one or the other category. As Professor Stone noted when she originally categorized the preemption cases, the best explanation seems to be that the non-preempted claims all parallel specific Supreme Court cases in which preemption was denied, and the remaining claims either

---

830, 832-33 (D.D.C. 1996) (finding no preemption where IIED claim arose from workplace harassment that did not implicate CBA); Blanchard v. Simpson Plainwell Paper Co., 925 F. Supp. 510, 518-19 (W.D. Mich. 1995) (finding no preemption where IIED claims were based on false representations made by employer); DiPuccio v. United Parcel Serv., 890 F. Supp. 688, 690 (N.D. Ohio 1995) (finding no preemption of IIED claim arising out of discriminatory supervision and assault on employee by supervisor); Sauls v. Union Oil Co. of Cal., 750 F. Supp. 783, 786-87 (E.D. Tex. 1990) (finding no preemption where collective bargaining agreement provided no remedy for IIED claim arising from defendant's dealings with non-union management employees); Meier v. Hamilton Standard Elec. Sys., Inc., 748 F. Supp. 296, 300 (E.D. Pa. 1990) (finding no preemption of IIED claim because grievance procedure available under collective bargaining agreement could not redress such wrongs); Zaks v. American Broad. Co., 626 F. Supp. 695, 698 (C.D. Cal. 1985) (finding no preemption because emotional distress was linked to clearly unpreempted claims).

[151] Many courts have not preempted whistleblower claims. *See, e.g.*, Montag v. Aerospace Corp., No. 95-55674, 1996 WL 454544, at *3-4 (9th Cir. Aug. 12, 1996) (employee reported violations of state and federal regulations and refused to suppress and conceal contents of a report); Dougherty v. Parsec, Inc., 872 F.2d 766, 771 (6th Cir. 1989) (employee fired for filing complaint with OSHA); Paige v. Henry J. Kaiser Co., 826 F.2d 857, 863 (9th Cir. 1987) (finding no preemption of employee's wrongful discharge claim because it depended on interpretation of state law, not collective bargaining agreement); Garibaldi v. Lucky Food Stores, 726 F.2d 1367, 1375-76 (9th Cir. 1984) (employee fired for reporting violation of state health law); *In re* The Prudential Ins. Co. of Am. Sales Practices Litig., 924 F. Supp. 627, 649 (D.N.J. 1996) (employees refused to participate in illegal sales practices); Foster v. Richardson, 843 F. Supp. 625, 629 (D. Haw. 1994) (employee terminated for filing a grievance alleging sex discrimination and sexual harassment by employer); Schroeder v. Crowley Maritime Corp., 825 F. Supp. 1007, 1009 (S.D. Fla. 1993) (driver fired because he refused to violate federal safety regulations by driving an unsafe vehicle), *aff'd*, 55 F.3d 638 (11th Cir. 1995); Ziobro v. Connecticut Inst. for the Blind, 818 F. Supp. 497, 501 (D. Conn. 1993) (dismissing claim resulting from improperly reporting an incident of child abuse); Brevik v. Kite Painting, Inc., 416 N.W.2d 714, 719 (Minn. 1987) (employee fired for filing complaint under state occupational safety and health act).

Other courts, however, have preempted these claims. *See, e.g.*, Baker v. KGMB, No. 91-15193, 1992 WL 84186, at *2 (9th Cir. Apr. 24, 1992) (dismissing retaliatory discharge claim where employee did not clearly state which public policy had been violated by his termination); Cullen v. E.H. Friedrich Co., 910 F. Supp. 815, 823 (D. Mass 1995) (employee discharged for allegedly threatening to inform district attorney about drug activity on employer's premises); Snow v. Bechtel Constr., Inc., 647 F. Supp. 1514, 1520 (C.D. Cal. 1986) (employee fired for reporting safety violations to Nuclear Regulatory Commission).

are always or sometimes preempted.[152] The result appears to be an unstated presumption that claims are preempted until the Supreme Court rules otherwise.

3. The Effect of Section 301 Preemption

As *Avco* made clear, a state law claim preempted by section 301 becomes from its inception a federal law section 301 claim for breach of a collective bargaining agreement.[153] This recharacterization permits the claim to be removed to federal court. Once in federal court, the claim must be dismissed and ordered to arbitration because the Supreme Court has held that all claims that are even arguably subject to an arbitration clause must be arbitrated rather than litigated.[154] Once arbitrated, courts will rarely reconsider the claim.[155] As a result, state law claims preempted by section 301 may be pursued, if at all, only through arbitration under the collective bargaining agreement.[156]

The problem, however, is that federal labor law permits labor arbitrators to resolve only issues concerning the interpretation of the collective bargaining agreement.[157] If arbitrators venture outside the parameters of this

---

[152] *See* Stone, *supra* note 6, at 609-10, 616.

[153] *See supra* note 94 and accompanying text.

[154] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); *see also infra* notes 175-84 and accompanying text.

[155] *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("The courts are not authorized to reconsider the merits of an [arbitral] award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards."); *see also* Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965) (requiring parties to exhaust their contractual remedies before seeking judicial resolution of disputes).

[156] *See* Schwartz & Parrot, *supra* note 83, at 297 ("The ultimate result of a successful preemption defense is that a once-promising state law tort or contract action will be removed to federal court, interpreted under federal common law, and then dismissed or subject to the vagaries of labor arbitration.").

[157] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) (stating that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties"); *Enterprise Wheel*, 363 U.S. at 597 (upholding an arbitral award "so long as it draws its essence from the collective bargaining agreement" and stating that an arbitration award that relies on external law instead of the collective bargaining agreement fails this test); *Warrior & Gulf Navigation*, 363 U.S. at 582 ("Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement."); David E. Feller, *The Impact of External Law Upon Labor Arbitration*, *in* THE

"private law" and consider external sources such as state law, they have "exceeded the scope of the submission" and their decision must be reversed.[158] The practical effect of section 301 preemption, therefore, is that preempted state law claims are extinguished. Employees, merely by organizing and becoming covered by a collective bargaining agreement—which in theory should *increase* their workplace rights—effectively waive many of the state statutory and common law causes of action that ostensibly protect all employees.[159]

B. *The FAA Arbitrability Doctrine*

Until recently, it has been assumed that the only individual employment rights that employees effectively waived by becoming subject to a collective bargaining agreement were the state law rights preempted by section 301.[160]

FUTURE OF LABOR ARBITRATION IN AMERICA 111 (Joy Correge et al. eds., 1976) (arguing that arbitrators should not attempt to resolve any dispute as to the proper interpretation or application of a statute unless explicitly authorized to do so by the parties); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137, 1142 (1977) ("[A]n award must 'draw its essence' [from the collective bargaining agreement] in order to be valid and enforceable." (quoting *Enterprise Wheel*, 363 U.S. at 597)). Dean Harry Shulman once stated that:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather a part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.

Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955); *see also* Harry T. Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65, 90 (1977) (stating that arbitrators should be reluctant to decide public law issues because "they may be wrong [and] their errors, if honored by a public tribunal out of deference to arbitration, . . . may distort the development of precedent"); David E. Feller, *The Coming End of Arbitration's Golden Age*, *in* ARBITRATION—1976: PROCEEDINGS OF THE TWENTY-NINTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 97, 110-11 (Barbara D. Dennis & Gerald G. Somers eds., 1976); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557-59 (1967) ("[P]arties typically call on an arbitrator to construe and not to destroy their agreement.").

[158] *Enterprise Wheel*, 363 U.S. at 597 (1960). The arbitrator may, on the other hand, examine external law in interpreting and applying the collective bargaining agreement. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 375 (4th ed. 1989) (noting that the *Enterprise Wheel* Court "expressly recognized the propriety of 'the arbitrator looking to the "law" for help in determining the sense of the agreement'").

[159] *Cf.* Stein, *supra* note 82, at 22 ("In enacting the LMRA, Congress clearly did not intend to ensure that state assignment of negotiable individual employment rights would always favor employers.").

[160] *See, e.g.*, Stone, *supra* note 6, at 635 (stating that the effect of arbitration under the

Some state law rights and most federal statutory rights, such as the right to be free from workplace discrimination on the basis of race, color, national origin, sex, age, or disability, are unaffected by section 301 preemption, leaving unionized employees apparently free to enforce these rights judicially. Recently, however, a second doctrine—the FAA arbitrability doctrine—has begun to emerge and effectively withdraw many of these rights from unionized employees. This doctrine has been discussed extensively in the legal literature insofar as it relates to the preemption of the statutory rights of nonunionized employees,[161] but very little insofar as it relates to

---

FAA is to enforce, rather than to extinguish, statutory rights).

[161] *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 383-84 (1996) (noting that the Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), relegates statutory claims to a "procedurally inadequate forum"); Bales, *supra* note 6, at 1863 (discussing the effects of compulsory arbitration on individual employment rights); Robert L. Duston, Gilmer v. Interstate/Johnson Lane Corp.*: A Major Step Forward For Alternative Dispute Resolution, or a Meaningless Decision?*, 7 LAB. LAW. 823, 848 (1991) ("Arbitration will remove uncertainty inherent in the jury process and ensure a forum where an employer has a greater chance of an impartial hearing."); Feller, *supra* note 17, at 983 ("I do not believe that arbitration will be required of claims under Title VII of the Civil Rights Act as amended in 1991, or the ADA, or that arbitration of claims under any of these acts will be required under collective bargaining agreements . . . ."); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMPL. & LAB. L. 282, 298 (1996) (noting that the FAA's exclusion of "contracts of employment" has not always been interpreted to the full extent of Congress's power under the Commerce Clause); Paul F. Gerhart & Donald P. Crane, *Wrongful Dismissal: Arbitration and the Law*, 48 ARB. J. 56, 59 (June 1993) ("In the collective bargaining environment, the union and the employer exercise continuing control over the arbitration process . . . . These controls are absent when arbitration is used as a means of deciding individual wrongful dismissal claims."); James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 101 (1993) (arguing that "consensual, binding arbitration is well-suited for resolving most employment discrimination claims"); Jeffery R. Knight, *Enforcing Arbitration Agreements Between Employers and Employees*, 61 DEF. COUNS. J. 251, 251 (1994) ("*Gilmer* casts serious doubt on the continuing validity of an earlier line of Supreme Court cases that effectively granted employees an absolute right to litigate against their employers, regardless of any agreement to arbitrate, if the dispute involved a federal statutory claim."); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77, 105 (1996) ("The Supreme Court's decision in *Gilmer* has given a major boost to the arbitration of statutory employment claims. Most lower courts have interpreted *Gilmer*'s liberal policy in favor of arbitration broadly and have compelled employees to arbitrate a wide range of claims."); Christopher S. Miller & Brian D. Poe, *Arbitrating Employment Claims: The State of the Law*, 46 LAB. L.J. 195, 204 (1995) ("The lingering issue of whether the FAA's exclusion of 'contracts of employment' trumps *Gilmer* in the context of ordinary employment contracts still prevails."); Ellwood F. Oakley, III & Donald O. Mayer, *Arbitration of Employment Discrimination Claims and the Challenge of Contemporary Federalism*, 47 S.C. L. REV. 475, 536 (1996) ("There is no reason to believe that

unionized employees. For this reason, I will sketch in broad relief the development of the doctrine, then examine in greater detail the doctrine as it relates to unionized employees.

1. The Early Years of Statutory Arbitration

At common law, an agreement to arbitrate was revocable by either party at any time before an award was rendered.[162] The FAA, enacted in 1925 as

---

Congress, in mentioning ADR in section 118 of the [Civil Rights Act of 1991], believed that it was endorsing the voluntary and knowing submission of federally based claims to nonjudicial fora."); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 572 (1990) ("Some courts have analyzed ERISA and other federal statutory employment cases arising under the FAA as if they involved labor arbitration under LMRA section 301. This confusion has led to a misinterpretation of congressional intent regarding the interplay between commercial arbitration and the federal employment statutes."); Stephen W. Skrainka, Essay, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 999 (1993) ("We have reached the point where courts now must decide whether arbitration of civil rights and other employment-related statutory claims is to have the same weight in the collective bargaining context as it has elsewhere."); Todd H. Thomas, *Using Arbitration to Avoid Litigation*, 44 LAB. L.J. 3, 17 (1993) ("Employment discrimination claims have received a boost from recently enacted statutes . . . . At the same time, the Supreme Court has expanded the coverage of the FAA and increased the prospects for enforcement of arbitration in individual employment discrimination disputes."); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 84-85 (1996) (discussing whether employment arbitration can ever be consensual on the part of employees); Pierre Levy, Comment, Gilmer *Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455, 455 (1996) ("[P]ost-*Gilmer* lower court rulings have used *Gilmer* as a launching point to abrogate statutorily-created employment rights.").

[162] *See* Oregon & W. Mortg. Sav. Bank v. American Mortg. Co., 35 F. 22, 23 (C.C.D. Or. 1888) ("Either party may revoke a submission to arbitration at any time before an award where the submission is not made a rule of court, or otherwise regulated by statute."); Jones v. Harris, 59 Miss. 214, 215 (1881) ("The right of either party to revoke a submission before award made, where the submission is not a rule of court, or regulated by a statute changing the common law, is well settled and universally recognized."); Allen v. Watson, 16 Johns. 205, 208 (N.Y. Sup. Ct. 1819) ("[T]he revocation of the powers of the arbitrators stripped them of all pretence of authority to act as such; and, in the strictest truth, the instrument to which they put their hands and seals, was no award under the submission, for the submission itself was at an end."); Kill v. Hollister, 95 Eng. Rep. 532, 532 (K.B. 1746) ("This is an action upon a policy of insurance, wherein a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration . . . but the agreement of the parties cannot oust this court . . . ."); Vynior's Case, 8 Coke 81b, 82a (K.B. 1609) ("[A]lthough the defendant was bound in a bond to stand to, abide, observe, &c. the rule, &c. arbitrament, &c. yet he might . . . countermand it . . . .").

the United States Arbitration Act,[163] and then reenacted and recodified in 1947,[164] changed this traditional view by creating a body of federal substantive law permitting judicial enforcement of agreements to arbitrate in connection with commercial and maritime transactions.[165] Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[166] Section 3 provides that a party to an arbitration agreement may obtain a stay of proceedings in federal court when an issue is referable to arbitration.[167] Section 4 permits such a party to obtain an order compelling arbitration when another party has failed, neglected, or refused to comply with an arbitration agreement, and allows for judicial enforcement of any award rendered.[168]

For years, courts interpreting the FAA refused to compel arbitration of statutory claims. This practice began with the Supreme Court's 1953 decision in *Wilko v. Swan*,[169] in which a buyer of securities had sued the seller for fraud, claiming violation of Section 12(2) of the Securities Act of 1933.[170] The Court refused to compel the buyer to arbitrate the claim despite the existence of an arbitration clause in the sales contract.[171] The Court held that the arbitration clause constituted an invalid waiver of the substantive law created by the statute, and therefore was void.[172] Lower federal courts subsequently interpreted *Wilko* as creating a "public policy" defense to the enforcement of arbitration agreements under the FAA when statutory claims were at issue.[173] This defense was premised on three assumptions: (1) courts

---

[163] 43 Stat. 883 (1925).

[164] 9 U.S.C. §§ 1-16 (1994).

[165] *See id.* § 2.

[166] *Id.*

[167] *See id.* § 3.

[168] *See id.* § 4.

[169] 346 U.S. 427 (1953).

[170] *See id.* at 428-29.

[171] *See id.* at 438.

[172] *See id.* at 430-35 ("[T]he right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act."). Section 14 of the Act provides that, "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulation of the Commission shall be void." 15 U.S.C. § 77n (1994).

[173] *See* G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 404 (1988) ("[C]ourts expanded the more general rationale of *Wilko*, the suspicion that statutory rights might get short shrift in arbitration, to cover an open-ended category of statutory claims that were held to be nonarbitrable for reasons of 'public policy'. . . ."); Michael G. Holcomb, Note, *The Demise of the FAA's "Contract of Employment" Exception?*, 1992 J. DISP. RESOL. 213, 216 ("After *Wilko*, lower courts began applying the 'public policy' doctrine to various statutory claims until the doctrine reached its zenith in the late

could enforce statutory rights better than arbitrators; (2) it contravened public policy to permit a party to waive her statutory right to a judicial forum by signing a predispute arbitration agreement; and (3) the informality of arbitration made it difficult for courts to correct arbitral errors in statutory interpretation.[174]

2. The *Steelworkers* Trilogy

While courts were proclaiming the general inferiority of arbitration for resolving statutory claims, the Supreme Court strongly endorsed the use of arbitration as a mechanism for resolving industrial disputes arising under collective bargaining agreements. In three cases decided in 1960 and known collectively as the *Steelworkers* Trilogy,[175] the Court relied on section 301 of the LMRA rather than the pro-arbitration policy of the FAA and held that the function of a court with regard to arbitration is limited to (1) assuring that the claim is governed by the contract,[176] (2) ordering the parties to arbitration unless the arbitration clause "is not susceptible of an interpretation that covers the asserted dispute,"[177] and (3) refraining from reviewing the merits of an award so long as it "draws its essence from the collective bargaining agreement."[178]

The *Steelworkers* Trilogy did not overrule the *Wilko* line of cases that denied enforcement of agreements to arbitrate statutory claims. Instead, the Court distinguished *Wilko* by pointing out that the *Steelworkers* cases arose in the unique context of the collective bargaining relationship.[179] Although the alternative to arbitrating statutory claims in the commercial context was judicial resolution of those claims "with established procedures or even special statutory safeguards," the alternative to arbitrating claims arising out of a

---

1960s and early 1970s.").

[174] *See, e.g.*, A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 716 (9th Cir. 1968) ("Public interest attaches to the ascertainment of the truth as to this [antitrust] issue. Such issues the parties cannot, by stipulation or otherwise, exclude from the area of judicial scrutiny and determination."); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827-28 (2d Cir. 1968) ("[T]he pervasive public interest in the enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear. . . . [W]e conclude that the antitrust claims raised here are inappropriate for arbitration . . . .").

[175] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[176] *See American Mfg. Co.*, 363 U.S. at 567-68 ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.").

[177] *Warrior & Gulf*, 363 U.S. at 582-83.

[178] *Enterprise Wheel*, 363 U.S. at 597.

[179] *See Warrior & Gulf*, 363 U.S. at 578 (noting the irrelevance of *Wilko*).

collective bargaining relationship was "industrial strife."[180] The *Steelworkers* cases thus were predicated, to a large extent, on the Court's fear of labor unrest,[181] a fear not applicable to the statutory cases that, until 1974, had not arisen in the employment context.[182]

Because the Court distinguished rather than overruled *Wilko*, the twin products of the *Steelworkers* Trilogy—a virtually irrebuttable presumption of arbitrability and a sharply limited role for the courts—applied only to arbitration clauses contained in collective bargaining agreements.[183] After the Trilogy, lower federal courts continued to apply *Wilko* to counter attempts to arbitrate statutory claims,[184] creating a rigid division between arbitrable collective bargaining issues and nonarbitrable statutory issues. This division was challenged in the 1974 case of *Alexander v. Gardner-Denver Co.*[185]

3. *Alexander v. Gardner-Denver Co.*

Gardner-Denver involved a statutory claim—seemingly nonarbitrable under *Wilko*—that the employer argued was arbitrable pursuant to the terms of a collective bargaining agreement and the *Steelworkers* Trilogy presumption of arbitrability. The plaintiff was an African-American drill operator who the company had discharged, ostensibly for producing too many defective

---

[180] *Id.*; *see also* Feller, *supra* note 17, at 974 ("Arbitration under a collective bargaining agreement, unlike commercial arbitration, was not an alternative forum for determining issues which would otherwise be litigated, but was developed as a substitute for the strike.").

[181] Note the similarity between the Supreme Court's justification in the *Steelworkers* Trilogy—fear of "industrial strife"—and its justification for the section 301 preemption doctrine—necessity of promoting "industrial peace."

[182] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); *see also infra* notes 220-39 and accompanying text.

[183] *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 758 (1990) ("To extend the special status that arbitration enjoys under the *Trilogy*—the twin features of a virtually all-embracive presumption of arbitrability and a sharply limited role for the courts—to settings where collective bargaining does not take place would . . . divorce the Court's doctrine from its underlying justification . . . .").

[184] *See* Shell, *supra* note 173, at 404 (noting that the lower federal courts "expanded the more general rationale of *Wilko*, the suspicion that statutory rights might get short shrift in arbitration, to cover an open-ended category of statutory claims that were held to be nonarbitrable for reasons of 'public policy'"); *see also* Romyn v. Shearson Lehman Bros., Inc., 648 F. Supp. 626, 632 (D. Utah 1986) (refusing to compel arbitration of RICO claims); Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955, 959 (D.N.J. 1982) (applying *Wilko* to a claim arising under the Commodities Exchange Act and noting cases in which courts have applied it to claims involving securities, antitrust, bankruptcy, patent, and Title VII).

[185] 415 U.S. 36 (1974).

parts.[186] Alexander filed a grievance pursuant to the terms of the collective bargaining agreement in place between his employer and his union.[187] At the arbitration hearing, Alexander testified that his discharge was the product of race discrimination.[188] The arbitrator ruled that the employer had discharged Alexander for just cause, but made no reference to Alexander's discrimination claim.[189]

Alexander then filed a Title VII race discrimination suit in federal district court.[190] The district court granted summary judgment for the employer and dismissed the suit, finding that the discrimination claim had been submitted to and resolved by the arbitrator.[191] The court also held that Alexander had voluntarily elected to pursue his grievance to final arbitration under the collective bargaining agreement's nondiscrimination clause and that he was bound by the arbitrator's decision.[192] The Court of Appeals for the Tenth Circuit affirmed.[193] The Supreme Court reversed, holding that an employee does not forfeit his Title VII discrimination claim by "first pursu[ing] a grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement."[194] The Court presented several reasons why labor arbitration was inappropriate for resolving Title VII claims.

First, the Court stated that labor arbitrators lack both the experience and the authority to resolve Title VII claims.[195] The Court noted that the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[196] Moreover, because the arbitrator's authority is derived exclusively from the collective bargaining agreement, the arbitrator has no authority to enforce public laws.[197] If she does decide an issue of public law, she has "exceeded the scope of the submission," and the resulting award is unenforceable.[198]

Second, the Court noted the relative informality of arbitration hearings as compared to judicial proceedings and concluded that arbitral factfinding procedures are inadequate to protect employees' Title VII rights.[199] The Court stated that, "[t]he record of the arbitration proceedings is not as complete;

---

[186] *See id.* at 38.

[187] *See id.* at 39.

[188] *See id.* at 42.

[189] *See id.*

[190] *See id.* at 43.

[191] *See id.*

[192] *See id.*

[193] *See id.*

[194] *Id.* at 49.

[195] *See id.* at 57.

[196] *Id.*

[197] *See id.* at 53.

[198] *Id.*

[199] *See id.* at 57-58.

the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[200] Moreover, the Court pointed out that arbitrators are under no obligation to issue written opinions.[201] Arbitration procedures, while well-suited to the resolution of contractual disputes, "make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[202]

Finally, the Court expressed concern that because the union exercises exclusive control over the manner and extent to which an employee's grievance is presented, the union's duty to represent employees collectively might interfere with its pursuit of an individual employee's claim.[203] For example, a union might be willing to concede an individual employee's discrimination grievance in return for a wage increase that benefits all employees.

Seven years after *Gardner-Denver*, the Court decided *Barrentine v. Arkansas-Best Freight System, Inc.*[204] In *Barrentine*, the Court extended the *Gardner-Denver* rule to claims brought under the FLSA, holding that arbitration pursuant to a collective bargaining agreement did not preclude subsequent litigation of a FLSA claim.[205] Three years later, in *McDonald v. City of West Branch*,[206] the Court extended the *Gardner-Denver* rule again, this time to claims arising under § 1983.[207] In both cases, as in *Gardner-Denver*, the Court reasoned that arbitral procedures were inadequate to guarantee proper enforcement of statutory rights, that arbitrators were not competent to interpret the law, and that because of a union's role as the collective representative of employees, the union might not forcefully arbitrate a particular employee's grievance.[208]

The *Steelworkers* Trilogy and the *Gardner-Denver* line of cases thus appeared to create a rigid division between the "law of the shop," for which final and binding arbitration was appropriate, and the "law of the land," for which it was not. After *Gardner-Denver*, this policy seemed equally prem-

---

[200] *Id. But see* ELKOURI & ELKOURI, *supra* note 158, at 376 ("Courts aren't right more often than arbitrators and the parties because they are wiser. They are 'right' because they have the final say." (quoting James E. Westbrook, *The End of an Era in Arbitration: Where Can you Go If You Can't Go Home Again?* (1980) (unpublished speech))).

[201] *See Gardner-Denver*, 415 U.S. at 58.

[202] *Id.* at 56.

[203] *See id.* at 58 n.19 ("[H]armony of interest between the union and the individual employee cannot always be presumed.").

[204] 450 U.S. 728 (1981).

[205] *See id.* at 745 ("FLSA rights . . . devolve on petitioners as individual workers, not as members of a collective organization.").

[206] 466 U.S. 284 (1984).

[207] *See id.* at 292. Section 1983 provides a cause of action where an individual has been deprived of a constitutional right. *See* 42 U.S.C. § 1983 (1994).

[208] *See McDonald*, 466 U.S. at 290-91; *Barrentine*, 450 U.S. at 742-45.

ised on the distinction between the union and the non-union context, and on the assumption that the arbitral process was inferior to the judicial process for the resolution of statutory claims. Following this line of Supreme Court authority, several federal appellate courts ruled that compulsory arbitration clauses contained in individual employment contracts—for example, in the non-union context—would not preclude subsequent suits under antidiscrimination laws.[209]

4. The *Mitsubishi* Trilogy

While post-*Gardner-Denver* decisions in the lower courts continued to deny compulsory arbitration of statutory claims in the employment context, the Supreme Court handed down three decisions approving compulsory arbitration of statutory claims arising under antitrust,[210] securities,[211] and racketeering[212] laws. These cases, known as the *Mitsubishi* Trilogy, created what I call the "FAA arbitrability" doctrine. Unlike the *Steelworkers* Trilogy, the *Mitsubishi* Trilogy was premised on the FAA, not section 301 of the LMRA. This represented a radical departure from *Wilko* and its progeny, which for more than thirty years had precluded application of the FAA to statutory claims.

In the *Mitsubishi* Trilogy, the Court interpreted the FAA as creating a presumption of arbitrability in situations where a party to an arbitration agreement attempts to enforce the agreement as a defense against the other party's attempt to litigate a statutory claim. In formulating a presumption similar to that adopted by the Court in the labor arbitration cases of the *Steelworkers* Trilogy, the Court stated that a claim arising under a statute will be presumed arbitrable absent explicit evidence of congressional intent to the contrary.[213] The party opposing arbitration bears the burden of showing that

---

[209] *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (Title VII); Nicholson v. CPC Int'l Inc., 877 F.2d 220, 230 (3d Cir. 1989) (ADEA); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1309 (8th Cir. 1988) (Title VII); *see also* Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465, 470 (D. Mass. 1980) (ADEA); *cf.* Pihl v. Thompson McKinnon Sec., 48 Fair Empl. Prac. Cas. (BNA) 922, 926 (E.D. Pa. 1988) (holding that ADEA claims are subject to compulsory arbitration).

[210] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616, 640 (1985) (enforcing a private contract to arbitrate claims arising under the Sherman Antitrust Act).

[211] *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 479, 486 (1989) (enforcing a private contract to arbitrate claims arising under section 12(2) of the Securities Act of 1933).

[212] *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238, 242 (1987) (enforcing a private contract to arbitrate claims arising under both RICO and section 10(b) of the Securities Act of 1934).

[213] *See Mitsubishi*, 473 U.S. at 628.

Congress intended to preclude a waiver of existing remedies.[214] This fact, as several commentators have noted, has made the presumption virtually irrebuttable.[215]

This new presumption of arbitrability was predicated on two assumptions, both of which were a marked departure from prior precedent. The first was that an arbitration agreement involves no waiver of substantive rights:

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[216]

The second assumption was that arbitrators are capable of deciding complex statutory issues. Noting that the parties may appoint arbitrators with particular statutory expertise and that either they or the arbitrator may employ experts, the Court concluded that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[217] On this basis, the Court concluded that *Wilko* had been incorrectly decided and was "inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."[218] *Wilko* thus was expressly overruled.[219]

The *Mitsubishi* Trilogy represented a transformation of the Supreme Court's attitude toward arbitration outside the employment context. Before *Mitsubishi*, statutory claims were not arbitrable; after *Mitsubishi*, they were arbitrable so long as they did not arise in the employment setting. It was thus in the context of the Court's increasing confidence in arbitral resolution of statutory business transaction claims that the Court decided to hear a case

---

[214] *See McMahon*, 482 U.S. at 227.

[215] *See, e.g.*, Michael Lieberman, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive Over Procedural Values in* Nicholson v. CPC International, Inc., 138 U. PA. L. REV. 1817, 1826 (1990) ("The Supreme Court's most forceful ruling in favor of arbitration came in *McMahon*, which rendered the presumption of arbitrability under the FAA nearly irrebuttable."). The FAA presumption of arbitrability articulated in the *Mitsubishi* Trilogy is analogous to the section 301 presumption of arbitrability enunciated by the Court in the *Steelworkers* Trilogy. *See supra* notes 175-85 and accompanying text.

[216] *Mitsubishi*, 473 U.S. at 628.

[217] *Id.* at 626-27. The "well past" language seems hyperbolic, given that just one year before the Court had stated that an arbitrator may lack the competence required to resolve the complex legal issues involved in a section 1983 action. *See* McDonald v. City of West Branch, 466 U.S. 284, 290 (1984).

[218] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

[219] *See id.* at 485.

raising the issue of the arbitrability of statutory *employment* claims.

5. *Gilmer v. Interstate/Johnson Lane Corp.*[220]

Robert Gilmer was a manager of financial services before his employer discharged him.[221] Shortly after his discharge, Gilmer filed a charge with the Equal Employment Opportunity Commission ("EEOC") and then instituted a civil suit, alleging that he had been discharged on account of his age in violation of the Age Discrimination in Employment Act ("ADEA").[222] The employer moved to compel arbitration pursuant to an arbitration agreement contained in Gilmer's registration agreement with the New York Stock Exchange, in which Gilmer had "agreed to arbitrate any dispute, claim, or controversy" between him and his employer "arising out of [his] employment or termination of [his] employment."[223]

The Supreme Court affirmed the Fourth Circuit Court of Appeals' grant of the order compelling arbitration.[224] In doing so, the Court rejected several broad arguments supporting Gilmer's claim that the compulsory arbitration clause should not preclude his ADEA suit. The Court first rejected the argument advanced by several *amici curiae* that section one of the FAA, which excludes "contracts of employment" from the application of the Act, rendered the FAA and its presumption of arbitrability inapplicable to Gilmer's case.[225] The Court next rejected Gilmer's argument that compulsory arbitration was inconsistent with the statutory purposes and framework of the ADEA, and that this inconsistency rebutted the presumption of arbitrability created by the *Mitsubishi* Trilogy.[226] The Court stated that the arbitral forum was consistent with the ADEA and adequate to protect the statute's important social policies,[227] that nothing in the ADEA evinced congressional intent to preclude arbitration with sufficient clarity to rebut the *Mitsubishi* presumption,[228] and that arbitration agreements in the employment setting would not be voided merely because they were entered into under conditions of unequal bargaining power between employers and employees.[229] The Court then dispensed with Gilmer's claim that the arbitral forum was inadequate to protect his statutory employment rights by noting that the *Mitsubishi* Trilogy had rejected this argument as "far out of step with our current strong endorse-

---

[220] 500 U.S. 20 (1991).

[221] *See id.*

[222] *See id.*; 29 U.S.C. §§ 621-634 (1994).

[223] *Gilmer*, 500 U.S. at 23 (quoting Appendix to Respondent's Brief at 1, 18) (internal brackets omitted).

[224] *See id.* at 35.

[225] *See id.* at 25 n.2.

[226] *See id.* at 27.

[227] *See id.*

[228] *See id.* at 29.

[229] *See id.* at 33.

ment" of arbitration.[230] It reasoned that because the arbitration agreement was contained in Gilmer's registration application with the New York Stock Exchange, the agreement was not part of his "contract of employment" with Interstate.[231]

Finally, and most importantly for purposes of this discussion, the Court rejected Gilmer's claim that *Gardner-Denver* protected his right to litigate, rather than arbitrate, his ADEA claim.[232] The Court distinguished its decision in *Gardner-Denver* by first noting that a labor arbitrator's authority is limited to interpreting the collective bargaining agreement at issue.[233] A labor arbitrator—like the one that decided the plaintiff's case in *Gardner-Denver*—lacks the authority to resolve statutory claims.[234] Gilmer, however, was not employed under a collective bargaining agreement, and the arbitrator who would decide his case had been given explicit authority to resolve "any dispute, claim or controversy" arising out of Gilmer's employment.[235] Therefore, the problem arising under section 301 preemption of courts requiring arbitration of individual employment rights that the arbitrator was not contractually permitted to resolve was not implicated by FAA arbitration.

The Court also distinguished *Gardner-Denver* on the basis that Gilmer—unlike the plaintiff in *Gardner-Denver*—was not covered by a collective bargaining agreement and thus did not depend on the goodwill of a union to provide adequate representation at the arbitration hearing.[236] The Court concluded that the tension between collective representation and individual rights present in *Gardner-Denver* did not apply to Gilmer.[237]

Finally, the Court noted that *Gardner-Denver* was not decided under the FAA.[238] Citing *Mitsubishi*, the Court imported the presumption of arbitrability from the commercial arbitration context of the *Mitsubishi* Trilogy to the non-collective bargaining agreement context of *Gilmer*.[239] Because the Court chose to distinguish *Gardner-Denver* rather than to overrule it, it is unclear whether a plaintiff may still litigate a statutory claim when subject to a collective bargaining agreement that provides for arbitration.

---

[230] *Id.* at 30 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989) (internal quotation marks omitted)).

[231] *See id.* at 25 n.2. The Court also noted that Gilmer had not presented, and the courts below had not considered, the effect of this provision on his case. *See id.*

[232] *See id.* at 33.

[233] *See id.* at 34.

[234] *See id.*

[235] *Id.* at 23, 35.

[236] *See id.* at 35.

[237] *See id.*

[238] *See id.*

[239] *See id.*

6. The FAA Arbitrability Doctrine in the Unionized Employment Context

Since *Gilmer*, courts have been split over whether an arbitration clause in a collective bargaining agreement triggers the FAA arbitrability doctrine.[240] Courts holding that the doctrine *is* triggered by such a clause have treated *Gilmer* as having overruled *Gardner-Denver*.[241] In *Austin v. Owens-*

---

[240] Many courts have held that the FAA arbitrability doctrine is triggered by the arbitration clause in a collective bargaining agreement. *See, e.g.*, Martin v. Dana Corp., No. 96-1746, 1997 WL 313054, at *8 (3d Cir. June 12, 1997), *withdrawn for reh'g en banc* (July 1, 1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 882 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996); Moore v. Duke Power Co., 971 F. Supp. 978, 984 (W.D.N.C. 1997); Bright v. Norshipco & Norfolk Shipbuilding & Drydock Corp., 951 F. Supp. 95, 98 (E.D. Va. 1997); Brummett v. Copaz Packing Corp., 954 F. Supp. 160, 163 (S.D. Ohio 1996); Jessie v. Carter Health Care Ctr., Inc., 930 F. Supp. 1174, 1176-77 (E.D. Ky. 1996); Knox v. Wheeling-Pittsburgh Steel Corp., 899 F. Supp. 1529, 1539 (N.D. W. Va. 1995) (requiring plaintiff to exhaust her collective bargaining agreement's arbitration procedure before litigating her Title VII claim in federal court); *see also* Stone, *supra* note 125, at 1036 (predicting that courts increasingly will apply the FAA to unionized employees' federal statutory claims).

Other courts, however, have held that the FAA arbitrability doctrine is not triggered by the arbitration clause in a collective bargaining agreement. *See, e.g.*, Penny v. United Parcel Serv., No. 96-3890, 1997 WL 651470, at *5-6 (6th Cir. Oct. 22, 1997); Brown v. Trans World Airlines, No. 96-1912, 1997 WL 610821, at *4 (4th Cir. Oct. 6, 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1453 (10th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 526 (11th Cir. 1997); Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996); LaChance v. Northeast Publ'g, Inc., 965 F. Supp. 177, 189-90 (D. Mass. 1997); DiPuccio v. United Parcel Serv., 890 F. Supp. 688, 692-93 (N.D. Ohio 1995); Randolph v. Cooper Indus., 879 F. Supp. 518, 520-23 (W.D. Pa. 1994); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 804 (C.D. Ill. 1994); Block v. Art Iron, Inc., 866 F. Supp. 380, 387 (N.D. Ind. 1994); Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 147 (D. Conn. 1993) ("[A] collective-bargaining agreement cannot—at least as a general matter—require an employee to arbitrate individual statutory claims."); *see also* Darby v. N. Miss. Rural Legal Servs., Inc., No. 1:96CV214-B-A, 1997 WL 88241, at *2 (N.D. Miss. Feb. 28, 1997) (holding that an employee need not exhaust grievance procedures contained in a collective bargaining agreement before filing suit alleging violation of statutory rights under the Americans with Disabilities Act); Hill v. American Nat'l Can Co., 952 F. Supp. 398, 408-09 (N.D. Tex. 1996) (same).

For further discussion of this issue, see Malin, *supra* note 161, at 84-88 (noting that most post-*Gilmer* courts hold that *Gardner-Denver* continues to remain viable); Amanda G. Dealy, Note, *Compulsory Arbitration in the Unionized Workplace: Reconciling* Gilmer, Gardner-Denver, *and the Americans with Disabilities Act*, 37 B.C. L. REV. 479, 480 (1996) (arguing that "courts should require arbitral resolution before allowing an employee to file individual suits under the ADA").

[241] *See* Stone, *supra* note 125, at 1034 ("Indeed, some lower courts' decisions effectively overrule *Gardner-Denver*.").

Brockway Glass Container, Inc.,[242] Austin, a unionized employee governed by a collective bargaining agreement containing both a nondiscrimination clause and an arbitration clause, was injured in a job-related accident.[243] Following the injury, Austin's doctor released her for light-duty work, but her employer stated that none was available, and instead placed her on medical leave and provided her with workers' compensation benefits.[244] While she was on leave, the employer eliminated her position and fired her.[245]

Austin sued her employer, alleging violations of Title VII and the ADA.[246] The employer moved to dismiss on the ground that Austin was bound by the arbitration clause and therefore could not litigate her claims.[247] The district court agreed and dismissed Austin's suit.[248] After reviewing the language in *Gilmer* that was favorable to arbitration and that criticized *Gardner-Denver*'s derogation of arbitration, a divided panel of the Fourth Circuit affirmed, concluding that, "*Gilmer* thus rejects the principal concern in [*Gardner-Denver*] that arbitration is an 'inappropriate forum' for the resolution of Title VII statutory rights."[249]

An alternative basis for holding that arbitration agreements within collective bargaining agreements trigger application of the FAA arbitrability doctrine involves distinguishing *Gardner-Denver* rather than treating it as overruled. The Supreme Court in *Gilmer* distinguished *Gardner-Denver* by noting that the parties in *Gardner-Denver* had not invoked the FAA.[250] Given the strong tenor of the Supreme Court's recent decisions in favor of arbitration,[251] it is easily conceivable that the Court might in the future use the FAA to distinguish *Gardner-Denver* into insignificance.[252]

---

[242] 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996).

[243] *See id.* at 877.

[244] *See id.*

[245] *See id.*

[246] *See id.*

[247] *See id.* at 878. The employer also argued that the court lacked subject matter jurisdiction because Austin had failed to obtain a right to sue letter from the EEOC. *See id.* Receipt of a right to sue letter is a statutory precondition to filing suit under Title VII and the ADA. *See* 42 U.S.C. § 2000e-5(f)(1) (1994) (describing procedures for filing a court claim).

[248] *See* Austin v. Owens-Brockway Glass Container, Inc., 844 F. Supp. 1103, 1106-07 (W.D. Va. 1994), *aff'd*, 78 F.3d 875, 886 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996).

[249] *Austin*, 78 F.3d at 880.

[250] *See supra* note 238 and accompanying text.

[251] *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 639 (1996) (taking note of "[t]he Court's enunciated preference for binding arbitration over litigation in the commercial area").

[252] *But see* Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 523 (11th Cir. 1997) (expressing doubt as to whether the *Gilmer* Court "intended to cast [*Gardner-*

Denver] upon the judicial mulch heap"). There is a significant barrier to applying the FAA to collective bargaining agreements. Section 1 of the FAA provides that, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). If collective bargaining agreements constitute "contracts of employment" pursuant to this exclusionary clause, the FAA cannot be applied to collective bargaining agreements.

In 1957, the Supreme Court held that section 301 of the LMRA granted federal courts the authority to order specific performance of an arbitration agreement contained in a collective bargaining agreement. *See* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 451 (1957). Prior to this decision, the lower federal courts were split on the issue of whether, and under what authority, a court could compel arbitration of a dispute arising under a collective bargaining agreement. *See id.* at 450-51. One of the prime potential sources of such authority was the FAA. Naturally, the question of whether the FAA section 1 exclusion prevented application of the Act to collective bargaining agreements arose frequently.

Some courts concluded that collective bargaining agreements are not "contracts of employment" within the meaning of the FAA and, therefore, are not excluded from the application of the FAA. *See, e.g.*, Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85, 100 (lst Cir. 1956); Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298, 302 (2d Cir. 1956); Hoover Motor Express Co. v. Teamsters Local Union 327, 217 F.2d 49, 53 (6th Cir. 1954); Tenney Eng'g, Inc. v. United Elec. Workers Local 437, 207 F.2d 450, 452-53 (3d Cir. 1953) (en banc) (holding that the exclusion applies only to workers directly engaged in transporting foreign or interstate commerce such as seamen and railroad employees, and that it does not apply to employees simply producing goods for subsequent resale in interstate commerce). These courts generally relied on Justice Jackson's dicta in *J.I. Case* that stated:

> Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.

J.I. Case Co. v. NLRB, 321 U.S. 332, 334-35 (1944).

Other courts, however, have concluded that collective bargaining agreements *are* "contracts of employment" within the meaning of the FAA and that, therefore, the FAA cannot be used to compel arbitration pursuant to an arbitration clause in a collective bargaining agreement. *See, e.g.*, Lincoln Mills of Ala. v. Textile Workers Union, 230 F.2d 81, 86 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957); Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, Local Div. 1210 v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310, 313 (3d Cir. 1951); *see also* King et al., *supra* note 161, at 116 ("If the fact that *Gardner-Denver* and its progeny were not decided under the FAA is deemed critical, then it should be possible in the future to preclude civil adjudication of statutory claims in favor of the arbitration clauses in collective bargaining agreements.").

In *Lincoln Mills*, the Court relied exclusively on section 301 as authority for enforcing arbitration clauses contained in collective bargaining agreements; the Court did not even discuss the FAA. Justice Frankfurter, dissenting, argued that the Court's silence constituted an implicit rejection of using the FAA as such authority. *See Lincoln Mills*, 353

Austin and its ilk can be, and have been, criticized on purely doctrinal grounds. In *Pryner v. Tractor Supply Co.*,[253] the plaintiff, like the plaintiff in *Austin*, was covered by a collective bargaining agreement containing both a nondiscrimination clause and an arbitration clause.[254] After Pryner's employer discharged him, he sued for racial harassment, discrimination, and retaliation in violation of Title VII, and disability discrimination in violation of the ADA.[255] The employer moved for summary judgment or, alternatively, a stay pending arbitration, based on the argument that the arbitration provision in the collective bargaining agreement extinguished Pryner's right to litigate his claims.[256]

The District Court for the Southern District of Indiana denied the employer's motions.[257] First, the court explicitly rejected the proposition advanced in *Austin* that *Gilmer* had overruled *Gardner-Denver*.[258] The court then turned to the grounds underlying the *Gilmer* Court's distinction of *Gardner-Denver*. As in *Gardner-Denver*, but unlike *Gilmer*, the arbitrator

---

U.S. at 466 (Frankfurter, J., dissenting). Since *Lincoln Mills*, the issue of whether the FAA applies to collective bargaining agreements has seldom arisen. *See* Oakley & Mayer, *supra* note 161, at 482 ("Since *Lincoln Mills*, arbitration clauses contained in collective bargaining agreements have been governed by section 301 of the LMRA . . . and not the FAA."); Andrew Kielkopf, Note, Gilmer v. Interstate/Johnson Lane Corp.*: An Employee Perspective*, 22 CAP. U. L. REV. 803, 808 (1993) ("[T]he circuit courts today rarely expend a great deal of effort to evaluate the exclusionary language of section 1 of the FAA, choosing instead to rely on section 301."). On the rare occasions when the issue does arise, it generally does so in the context of providing an alternative basis for enforcing a collective bargaining agreement's arbitration clause, or where a court seeks an analogous statute from which it can draw a procedural tool, such as a limitations period, for use with section 301. *See, e.g.*, Posadas de Puerto Rico Assocs., Inc. v. Associacion de Empleados de Casino de Puerto Rico, 873 F.2d 479, 480-81 (1st Cir. 1989).

Since *Lincoln Mills*, most courts have held or indicated that the FAA exclusionary clause applies to collective bargaining agreements, and that the FAA therefore cannot serve as a basis for compelling arbitration pursuant to arbitration clauses contained in those agreements. *See, e.g.*, United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 943-44 (10th Cir. 1989); Bacashihua v. United States Postal Serv., 859 F.2d 402, 404-05 (6th Cir. 1988); American Postal Workers Union v. United States Postal Serv., 823 F.2d, 466, 473 (11th Cir. 1987); Service Employees Int'l Union, Local No. 36 v. Office Ctr. Servs., Inc., 670 F.2d 404, 406-07 (3d Cir. 1982); Bynes v. Ahrenkiel Ship Management, 944 F. Supp. 485, 487 (W.D. La. 1996). *But see* Feller, *supra* note 17, at 978 (predicting that the Supreme Court will find that the FAA exclusion does not apply to collective bargaining agreements).

[253] 927 F. Supp. 1140 (S.D. Ind. 1996), *aff'd*, 109 F.3d 354 (7th Cir. 1997).

[254] *See id.* at 1142.

[255] *See id.* at 1142-43.

[256] *See id.* at 1143.

[257] *See id.* at 1148.

[258] *See id.* at 1145 ("The fatal flaw in *Austin* is its failure to fully consider the prior holding of *Gardner-Denver*.").

who would decide Pryner's case had authority only to decide issues pertaining to the collective bargaining agreement, and therefore lacked authority to resolve statutory claims.[259] Similarly, Pryner's arbitration claims would be controlled by a union that might or might not pursue the claims vigorously, whereas Gilmer controlled his own arbitration claims.[260] The *Pryner* court also considered whether application of the FAA would change the equation.[261] Because the policy bases undergirding the *Gardner-Denver* decision were equally strong on the facts of *Pryner*, the court concluded that it would not.[262] The court therefore ruled that Pryner could pursue his legal claims in court independently of the grievance procedure provided by his collective bargaining agreement.[263]

On appeal, the Seventh Circuit, in an opinion authored by Judge Richard Posner, affirmed.[264] Like the district court, the circuit court framed the issue as whether *Gilmer* or *Gardner-Denver* controlled.[265] The court concluded:

> On balance our case is closer to [*Gardner-Denver*], but is enough left of [that case] to compel a decision in favor of the plaintiffs? Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so. . . . The conservative reading of *Gilmer* is that it just pruned some dicta from [*Gardner-Denver*]—and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights. That issue was not before the Court or discussed by it. The Court may have so distinguished [*Gardner-Denver*] as to deprive it of any authoritative force; but that is the most it did and by doing so opened what till then had been a closed issue. It did not resolve the issue . . . .[266]

One way of looking at *Austin* and other cases holding that arbitration clauses in collective bargaining agreements can be used to compel arbitration of legal claims is that they misinterpreted the holdings of *Gilmer* and *Gardner-Denver* and misunderstood the policy justifications of the Supreme Court's distinction between the union and nonunion context. Essentially, the Seventh Circuit took this approach. Simply saying, however, that the *Austin* line of cases misconstrued the law—although I believe they did—ignores their very real present impact.

---

[259] *See id.* at 1146.

[260] *See id.*

[261] *See id.* at 1146-47.

[262] *See id.* at 1147.

[263] *See id.* at 1148.

[264] *See* Pryner v. Tractor Supply Co., 109 F.3d 354, 365 (7th Cir. 1997).

[265] *See id.* at 363-64.

[266] *Id.* at 365 (citation omitted).

7. The Effect of FAA Arbitrability

The FAA arbitrability doctrine does nothing more than enforce contractual agreements to arbitrate. If two parties agree to the prospective arbitration of some types of claims but not others, the FAA arbitrability doctrine may only be used to compel arbitration of the former because "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[267] Therefore, the starting place for determining arbitrability is the agreement itself.

In some collective bargaining agreements, the employer assumes the statutory or common law duties imposed by individual employment rights. If such an agreement includes a broad arbitration clause, such as one that mandates arbitration of "all disputes," the employer can argue that employees have—through their agent, the union—contracted for the arbitration of their statutory and common law claims, and that the arbitration clause therefore extends to such claims. For example, in *Brummett v. Copaz Packing Corp.*,[268] the collective bargaining agreement provided:

> The Company and the Union agree that they will not discriminate because of race, color, religion, disability, sex, national origin, age, or status as a disabled or Vietnam era veteran in accordance with the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1971, both as amended, and the Vietnam Veterans Readjustment Assistance Act. The Company and the Union agree to comply with the Americans with Disabilities Act and the Family and Medical Leave Act . . . .[269]

The agreement also provided that all grievances arising under the collective bargaining agreement were subject to a detailed grievance procedure culminating in binding arbitration.[270] Based on these clauses, the court concluded that the parties intended for the arbitration clause to apply to claims brought under the statutes referred to in the agreement, and that the labor arbitrator would have authority to decide the statutory claims.[271] The court, therefore, dismissed the lawsuit the employees had filed in federal court.[272]

Similarly, the nondiscrimination clause found in the collective bargaining agreement in *Austin* provided that, "[t]he Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status. . . . This contract shall be administered in accordance with the appli-

---

[267] Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[268] 954 F. Supp. 160 (S.D. Ohio 1996).

[269] *Id.* at 162.

[270] *See id.*

[271] *See id.* at 163 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

[272] *See id.* at 164.

cable provisions of the Americans with Disabilities Act."[273] Thus, where a collective bargaining agreement imposes an explicit contractual duty on the employer to observe employees' legal rights, courts often interpret the arbitration clause to incorporate the statutory rights themselves.[274]

Many collective bargaining agreements, however, merely contain a simple nondiscrimination clause.[275] The agreement at issue in *Pryner*, for example, provided:

> The Company and Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of an individual's race, color, religion, age, sex, or national origin. Nor will the Company limit, segregate, or classify associates in any way to deprive any individual associate of employment opportunities because of race, color, religion, age, sex, veteran [sic] or national origin.[276]

Because agreements containing nondiscrimination clauses like this make no explicit attempt to incorporate external law by reference, they present a much weaker argument for extending the arbitration clause to the discrimination claims. Therefore, it is not surprising that where courts have compelled arbitration of a legal discrimination claim based on an arbitration clause in a collective bargaining agreement, the collective bargaining agreement at issue has been one that either at least arguably incorporated the external law by reference or contained a sufficiently broad arbitration clause.[277] In cases where courts have refused to compel arbitration, the collective bargaining agreement generally has looked more like the agreement at issue in

---

[273] Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir. 1996).

[274] *Cf.* Rudolph v. Alamo Rent A Car, Inc., 952 F. Supp. 311, 318 (E.D. Va. 1997) (holding that because the collective bargaining agreement at issue did not address the "employee's statutory right to be free from discrimination and harassment" and because the agreement did not "require arbitration of 'any' employment dispute," the court could not interpret the agreement to mandate arbitration of the plaintiff's statutory claims).

[275] *See* ELKOURI & ELKOURI, *supra* note 158, at 383 (discussing the ways in which arbitrators have interpreted nondiscrimination clauses in collective bargaining agreements); *see also In re* Alameda-Contra Costa Transit Dist., 75 Lab. Arb. Rep. (BNA) 1273, 1280 (1980) (stating that where a collective bargaining agreement did not contain a nondiscrimination clause, one could be inferred from the agreement's prohibition of discharges made without "just and sufficient cause").

[276] Pryner v. Tractor Supply Co., 927 F. Supp. 1140, 1142 (S.D. Ind. 1996), *aff'd*, 109 F.3d 354 (7th Cir. 1997).

[277] I say a legal *discrimination* claim because although most collective bargaining agreements contain some sort of nondiscrimination clause, it would appear that few mention other types of legal claims, such as those derived from state or common law. *See, e.g.*, Brummett v. Copaz Packing Corp., 954 F. Supp. 160, 162 (S.D. Ohio 1996) (reproducing the agreement that incorporates law by reference).

Pryner.[278]

Though most of the hoopla concerning the FAA arbitrability doctrine has centered on the compelled arbitration of federal statutory claims, the doctrine applies equally to state statutory and common law claims.[279] But because there is seldom any overt attempt to incorporate these claims by reference into the collective bargaining agreement, they usually present a weak argument for compelling arbitration. Of course, the FAA arbitrability doctrine applies only to claims that the parties have agreed to arbitrate. If the parties have, through collective bargaining, agreed to arbitrate the claim, then the arbitrator has the contractual authority to resolve it. Absent a situation where a court concludes that the claim falls within the collective bargaining agreement but the arbitrator concludes that they fall outside of it, the claims do not simply vanish as they do with section 301 preemption.[280]

---

[278] *See, e.g.*, Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 524 (11th Cir. 1997) (noting that "in this case the arbitrator only has authority to interpret the collective bargaining agreement; the arbitrator does not have the authority to resolve statutory claims"); Brown v. Trans World Airlines, No. 96-1912, 1997 WL 610821, at *5 (4th Cir. Oct. 6, 1997) (distinguishing *Austin* on the basis of the broad nature of the arbitration clause at issue in that case); Nichols v. General Motors Co., No. C-1-95-168, 1997 WL 612926, at *8 (S.D. Ohio Mar. 28, 1997) (noting that the arbitration clause provided that it was the exclusive *contractual* procedure for remedying discrimination claims); DiPuccio v. United Parcel Serv., 890 F. Supp. 688, 692 (N.D. Ohio 1995) (noting that in *Gilmer*, "the Supreme Court distinguished the plaintiff's contract . . . from collective bargaining agreements in which parties had not specifically agreed to arbitrate their statutory claims"); Randolph v. Cooper Indus., 879 F. Supp. 518, 520 (W.D. Pa. 1994) (quoting the text of a "boilerplate antidiscrimination clause" that contained no reference to external law); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 803 (C.D. Ill. 1994) (noting that text of collective bargaining agreement contained no reference to external law in antidiscrimination clause); Block v. Art Iron, Inc., 866 F. Supp. 380, 387 (N.D. Ind. 1994) (taking note of "strong evidence that ADA claims are not governed by or subject to the grievance/arbitration provisions of the CBA"); Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 145 (D. Conn. 1993) ("[T]he plaintiff is not barred from bringing her Title VII claim because the collective bargaining agreement does not require employees to submit individual statutory claims to arbitration.").

[279] *See* Bales, *supra* note 6, at 1899-1901 & nn.236-45 (noting cases in which courts held that the FAA preempted state law and concluding that "[t]he FAA thus requires courts to compel arbitration of employment disputes arising under state law, whether that state law is a creation of statute or common law" (footnotes omitted)).

[280] With section 301, claims "vanish" not just because unions decline to pursue them—this can happen with any type of grievance—but because courts systematically "send" to arbitration preempted claims that the arbitrator does not have the authority to resolve. With FAA arbitration, however, either: (1) the arbitrator lacks contractual authority to resolve the "legal"—external law—claim, in which case, the employee may pursue her claim in court; or (2) the arbitrator has contractual authority to resolve the claim, in which case the arbitrator can resolve it, but will award only a narrow range of damages. Thus, claims that implicate the FAA arbitrability doctrine don't "vanish"—they are resolved by

That is not to say, however, that employees lose nothing by being forced to arbitrate their legal claims under the terms of a collective bargaining agreement. For instance, the damages they can obtain through arbitration are not comparable to those available through litigation. The Civil Rights Act of 1991,[281] which applies to Title VII, the Americans with Disabilities Act, and the Rehabilitation Act, expressly permits recovery of front and back pay, compensatory and punitive damages, as well as mental anguish damages, up to a capped amount determined by the size of the employer's workforce.[282] These same damage categories, without the cap, are available under traditional tort law.[283] Remedies available under most collective bargaining agreements, however, are limited to reinstatement and back pay,[284] and even when other categories of damages are permitted, they are seldom awarded.[285]

---

either the courts or the arbitrator.

[281] 42 U.S.C. §§ 1981-1981a (1994).

[282] *See id.*

[283] *See* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 463 (1992) ("When the court treats the dismissal as a tort, the damages may be many times greater [than the damages awarded in contract], for they may include, in addition to economic loss, damages for emotional distress and punitive damages.").

[284] *See* Korn, *supra* note 83, at 1156-57 ("Remedies available to discharged employees under the NLRA and most collective bargaining agreements, are limited to reinstatement and back pay, while successful plaintiffs in wrongful termination actions can recover extra-contractual damages including punitive damages."); *see also* Stein, *supra* note 82, at 19 n.99 ("Full tort damages are virtually never recoverable in contractual grievance proceedings."); *id.* at 23 ("[I]t is rare that a collective bargaining agreement provides remedies comparable to those secured by state law.").

Reinstatement and back pay are woefully inadequate remedies for a wrongful discharge. Reinstatement often occurs months after the discharge. By this time, the employee is likely to have found another job, and understandably will be reluctant to give up the new job in exchange for the old job, working with the very people responsible for the wrongful discharge. Back pay awards ignore the devastating effects of losing one's paycheck for a substantial period of time, such as having one's house foreclosed or car repossessed. *See* Summers, *supra* note 283, at 535 ("Most present remedies provide little or no deterrence. NLRB cease and desist orders do no more than warn the employer not to repeat the violation.").

[285] *See* Otis H. King, *How Whole Is Whole?: Remedies in Labor Arbitration*, 3 J. CONTEMP. LEGAL ISSUES 167, 169-73 (1989-90) ("[Arbitrators] have tended to view [a remedy making the grievant] 'whole' as constituting simply a return to work and a restoration of seniority and other benefits along with back pay."); E. Allan Farnsworth, *Punitive Damages in Arbitration*, 20 STETSON L. REV. 395, 400-01 (1991) ("[I]n spite of the fact that most arbitral awards are complied with voluntarily and without judicial intervention—prudent arbitrators may decline to render an award of punitive damages if it would not be enforceable."); David E. Feller, *Remedies in Arbitration: Old Problems Revisited*, *in* ARBITRATION ISSUES FOR THE 1980S 109, 111 (James L. Stern & Barbara D. Dennis eds., 1982) ("The arbitrator's function is not to award damages. What he sometimes does

Thus, employees who have not been discharged, such as "mere" victims of racial or sexual harassment, receive no compensation; the arbitrator simply orders the employer to stop the practice.[286] Given that a successful employment discrimination lawsuit often yields a judgment in the mid-to-high-six-figure range,[287] the penalty imposed on employees by forcing them to submit their legal claims to labor arbitration is significant. Anyone who believes that reinstatement and back pay are effective tools for deterring employer misconduct need only look at the lack of success that the NLRB has had in policing unfair labor practices under the NLRA with only these remedies in its enforcement arsenal.[288]

Furthermore, employees whose legal rights have been violated may not be able to obtain any redress at all if the union decides not to pursue their grievances.[289] In such a case, an employee has no recourse[290] unless he can meet

---

may look like damages . . . . But it is not. It is what the arbitrator finds is the remedy provided for in the agreement."); Anthony V. Sinicropi, *Two Views of Remedial Authority*, *in* ARBITRATION ISSUES FOR THE 1980S, *supra*, at 134 ("[I]f a contract provides for back pay, then inherent therein is the act of calculating the amount of back pay the employee should receive to make him whole, . . . [this] must include every appropriate element of a back-pay calculation such as actual outside earnings and mitigation of losses."); Note, *Protecting Intangible Expectations Under Collective Bargaining Agreements—Overcoming the Proscription of Arbitral Penalties*, 61 MINN. L. REV. 127, 128 (1976) ("In order to effectively defuse industrial tension, the arbitral process must accommodate and remedy injuries to intangible interests. Since the present view of arbitral remedial power stifles the protection of those interests, an alternative must be found.").

[286] *See* Summers, *supra* note 283, at 527 ("Arbitration remedies limited to specific performance and lost wages are often incomplete. An employee who is subjected to racial or sexual harassment receives no compensation, the employer is simply told to put an end to the practice.").

[287] *See* JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF TERMINATION 26-27, 44 (1988) (finding that of 120 California employment cases that ended in jury verdicts between 1980 and 1986, the average verdict for winning plaintiffs was nearly $650,000, and the ten highest verdicts averaged nearly $4 million); Cliff Palefsky, *Wrongful Termination Litigation: "Dagwood" and Goliath*, 62 MICH. B.J. 776, 776 (1983) (noting a 1982 study that found the average verdict in California wrongful discharge cases to be $450,000).

[288] *See* WEILER, *supra* note 23, at 234-41 (discussing the NLRB's flaws and the dramatic rise in the number of unfair labor practice charges brought before the Board); Summers, *supra* note 283, at 478-79 (concluding that the NLRB's "remedies provide little deterrence of violations," and that employers consider the cost of these remedies "a small price to pay for eliminating enough union activists, intimidating others, and maintaining a union free environment").

[289] *See* Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997) (noting that "the grievance and arbitration procedure [of a collective bargaining agreement] can be invoked only by the union, and not by the worker").

[290] *See* Vaca v. Sipes, 386 U.S. 171, 191 (1967) ("[W]e do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the

the heavy burden[291] of showing that the union's refusal was "arbitrary, discriminatory, or [taken] in bad faith."[292] Although some commentators attach little significance to the possibility that a union will refuse to advance a meritorious grievance,[293] this ignores the unions' legacy of active participation in, or passive acquiescence to, employment discrimination.[294] It also ig-

---

provisions of the applicable collective bargaining agreement.").

[291] *See* Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 78 (1991) ("Any substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities."); Stein, *supra* note 82, at 23 ("[A unionized] employee may not always be able to get redress because access to arbitration is controlled by the union. If the union decides not to proceed . . . , the employee has no recourse unless she can establish that the unions' refusal was motivated by 'arbitrary, discriminatory, or bad faith' reasons . . . ." (quoting *Vaca*, 386 U.S. at 190)).

[292] *Vaca*, 386 U.S. at 190; *see also* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."). The union has broad discretion as to whether to prosecute a grievance. It may permissibly take into account tactical and strategic factors such as its limited resources and its consequent need to establish priorities, as well as its desire to maintain harmonious relations among employees and between them and the employer. *See Vaca*, 386 U.S. at 191-92; *see also* Danylchuk v. Des Moines Register & Tribune Co., No. 97-1322, 1997 WL 644364, at *2 (8th Cir. Oct. 21, 1997) (holding that a union did not breach its duty of fair representation when it dropped an employer's grievance in return for the employer's agreement to a new collective bargaining agreement); Garcia v. Zenith Elec. Corp., 58 F.3d 1171, 1176 (7th Cir. 1995) ("The union represents the majority of employees, even while it is representing a single employee in a grievance process. . . . The union is therefore entitled to enjoy a somewhat different perspective than the individual employee it represents in a grievance matter."); Kulavic v. Chicago & Ill. Midland Ry. Co., 1 F.3d 507, 515 (7th Cir. 1993) ("[I]n the collective bargaining process, the manner and extent to which an individual grievance is presented and the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."). The scope of judicial review of the union's discretion is deferential. *See O'Neill*, 499 U.S. at 78; Trnka v. Local Union No. 688, United Auto. Workers, 30 F.3d 60, 61 (7th Cir. 1994) ("To prevail on a claim that his union violated its duty of representation by dropping a grievance, a plaintiff-member must show that the union's decision was arbitrary or based on discriminatory or bad faith motives."); Moore v. Duke Power Co., 971 F. Supp. 978, 984-85 (W.D.N.C. 1997) (holding that a union's possible negligence in failing to timely file a grievance alleging disability discrimination did not constitute bad faith, and therefore would not justify vacating the arbitration award or permitting the employee to file suit on his claim).

[293] *See, e.g.*, Summers, *supra* note 283, at 524 ("Most unions, however, feel morally and politically obligated to carry all substantial cases to arbitration. They give priority to the point of impoverishment to contest unjust dismissals and substantial discipline, often following the policy of carrying any discharge to arbitration if the employee requests.").

[294] *See, e.g.*, Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 749-50 (1981) (Burger, C.J., dissenting) (noting the "long history of union discrimination"

nores the very real and fairly common conflict of interest that arises when a union operating in a historically segregated industry is given exclusive responsibility for pursuing a discrimination claim brought by a minority. For example, one cannot be highly confident that a union representing construction workers will vigorously pursue a claim of sexual harassment.[295] Given this possibility, the *Gardner-Denver* Court's refusal to force employees to submit their legal claims to labor arbitration seems to make a great deal of sense.

C. *The Combined Effect of the Two Doctrines*

For the unionized employee, the section 301 preemption doctrine entirely eliminates a broad spectrum of individual employment rights by requiring arbitration of claims that an arbitrator is not legally entitled to hear. Many of the employee's remaining individual employment rights are rendered inconsequential by the FAA arbitrability doctrine. By requiring arbitration in lieu of litigation, the FAA arbitrability doctrine eliminates meaningful remedies and vests enforcement in a union whose interests may be antithetical to the aggrieved employee. Together, the two doctrines either eliminate or significantly diminish virtually every employment right that unionized employees might otherwise enforce themselves through litigation.

---

against minorities and women); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 195, 202-03 (1944) (striking, as violative of the Railway Labor Act, a union-negotiated collective bargaining agreement that provided that "not more than 50% of the firemen . . . should be Negroes"); F. RAY MARSHALL, THE NEGRO AND ORGANIZED LABOR 89-105 (1965) (discussing the history of discrimination in American unions); *see also* WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS 281-362 (1977) (discussing the importance of remedy and enforcement after the standards for establishing liability have been promulgated); Goldberg, *supra* note 32, at 652-55 (discussing exclusion and underrepresentation of women and minorities from unions); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 543 (1997) ("The long-lasting exclusion of black, Chinese, and Japanese workers from American labor unions represented not just the exclusion of individual applicants but the purposeful exclusion of racial groups . . . ."). *See generally* ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW (1971) (discussing racial discrimination in employment and focusing on the recruiting, hiring, and promotion practices of the construction industry).

[295] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974) ("[H]armony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made."); Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997) ("[A] worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so."); *see also* R. Bales, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y 161, 197 (1992) (discussing potential conflicts of interest between incumbent union members and the large class of disabled individuals seeking entry into the labor pool).

Not all individual employment rights, however, are enforced exclusively through private litigation. Some, such as the workplace safety rights created by OSHA, are enforced exclusively by an administrative agency, and others, such as the federal antidiscrimination statutes, are enforced by both administrative agencies and private litigation. The two doctrines have no effect on the powers of administrative agencies to enforce the employment laws under their jurisdiction. They have no effect on the Occupation and Safety Health Administration's ability to administer OSHA, or on the EEOC's ability to administer the federal antidiscrimination statutes.[296] One should not conclude from this, however, that these agencies can pick up the enforcement slack created by the preemption and arbitrability doctrines. For one thing, the agencies responsible for enforcing employment laws are hopelessly backlogged and understaffed so that they are incapable of offering meaningful protection.[297] The EEOC, for example, brings suit in only one-half of one percent of the discrimination charges brought before it,[298] and mounting evidence suggests that OSHA has a negligible effect on workplace safety.[299] Also, many of the individual employment rights affected by the preemption and arbitrability doctrines, such as the rights created by common law, have no agency with authority to enforce them.

---

[296] *See* RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 81-84 (forthcoming 1997) (noting that the EEOC's authority to litigate employment discrimination claims is independent of the right that employees have to file suit on their own behalf).

[297] *See* Summers, *supra* note 283, at 545-46 ("[E]mployees cannot rely on government agencies to enforce their rights. Government agencies are often too hobbled by budget limitations and too vulnerable to political appointees who are unsympathetic to the substantive rights meant to be protected."); *id.* at 479-82 (discussing the inadequacy of EEOC's enforcement of antidiscrimination laws); *id.* at 491-96 (discussing the inadequacy of Department of Labor's enforcement of wage and hour laws); *id.* at 504-14 (discussing the inadequacy of OSHA's enforcement of workplace safety laws); *see also* Robert S. Smith, *Have OSHA and Worker's Compensation Made the Workplace Safer?*, *in* RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 557 (David Lewin et al. eds., 1992) (presenting data showing the negligible impact that OSHA has had on workplace safety).

[298] *See* William M. Howard, *Arbitrating Claims of Employment Discrimination: What* Really *Does Happen? What* Really *Should Happen?*, 50 DISP. RESOL. J. 40, 45 (Oct.-Dec. 1995) ("[T]he EEOC currently has a backlog of over 100,000 claims, 99.5% of which *it will not litigate* on behalf of the claimant."); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 16, 21 (1996) (noting that the EEOC receives approximately 90,000 charges of discrimination per year, but in fiscal year 1992, the agency filed only 347 substantive lawsuits involving a total of 456 allegations of discrimination); Summers, *supra* note 283, at 480 (noting that in 1988 the EEOC received 58,853 charges, but that in 1989, the agency brought only 563 suits for employment discrimination).

[299] *See* Summers, *supra* note 283, at 504-14 (discussing the inadequacy of OSHA's enforcement of workplace safety laws).

The practical impact of the two doctrines, then, is to impose a substantial penalty on union membership. This has two unfortunate consequences. First, it discourages union membership because few rational employees would join a union if they knew that by doing so they give up not only a broad spectrum of state law protections, but also the possibility of receiving any meaningful recovery for discrimination or sexual harassment. As Judge Alex Kozinski of the Ninth Circuit has put it:

> It is not inconceivable that an employer could point to this discrepancy [between rights for unionized workers and rights for nonunionized workers] as an argument against an effort to unionize: "Look here, if you vote for the union, the first thing that happens is that the state Labor Commission abandons you." In a closely fought election, this type of argument might make a difference.[300]

The second consequence of the preemption and arbitrability doctrines is that it leaves union members virtually unprotected from the types of employer abuses that we as a society find unacceptable. Many rights simply vanish.[301] Others become waivable by a union, and even when enforced, command remedies that serve as virtually no deterrent to undesirable behavior. Because rights enforced only by light penalties are not secure,[302] an order to "go and sin no more" does not reinforce the notion that harassment or discrimination or other such conduct is intolerable.

The penalty imposed on union employees by the preemption and arbitrability doctrines is self-reinforcing. As union membership dwindles, unions

---

[300] Livadas v. Aubrey, 943 F.2d 1140, 1150 n.2 (9th Cir. 1991) (Kozinski, J., dissenting), *rev'd sub nom.* Livadas v. Bradshaw, 114 S. Ct. 2068 (1994); *see also* Stone, *supra* note 6, at 643 (noting that "employers frequently inform their employees during organizing drives that they will lose various state law rights if they form a union"); White, *supra* note 83, at 393 ("A union . . . loses stature as the employee representative if the employee need not look to the union to pursue his employment related dispute."); David L. Durkin, Comment, *Employment-At-Will in the Unionized Setting*, 34 CATH. U. L. REV. 979, 1017-18 (1985) ("As the grievance procedure becomes nonexclusive in the settlement of contractual disputes, the procedure's attractiveness as a means of dispute resolution wanes."). *But see* Stein, *supra* note 82, at 48 ("The last thing that an employer with a somewhat disgruntled workforce would like to do is raise workers' consciousness about their state law rights against the employer.").

[301] *See supra* notes 139-45 and accompanying text (discussing various claims that are generally preempted). Of course, one may argue that the unionized employees may bargain for the rights they have lost to preemption and arbitrability. This begs the question, however, of why unionized employees should bargain from a lower baseline than their nonunionized counterparts, or whether they will have the bargaining power to make up this difference. *See* Stein, *supra* note 82, at 22-23 (arguing that unionized employees should not be deprived of rights enjoyed by nonunion employees except where the state itself declines to extend those rights to them).

[302] *See* Stein, *supra* note 82, at 19 ("A right is only as secure as the remedy which attaches to its violation.").

become increasingly unable to secure minimal terms of employment. Legislatures and courts then create new individual employment rights to fill the void.[303] Because of the section 301 preemption and statutory arbitrability doctrines, these new rights effectively apply only to nonunion employees. The effect is to further exacerbate the penalty on union membership and thereby decrease union power even more, creating yet a greater demand for individual employment rights.

Why does our legal system tolerate this disparity in the legal protections afforded unionized and nonunionized employees when these protections are ostensibly universal? I believe that despite the different legal origins of the two doctrines, they are nonetheless grounded in the same ideology.

III. INDUSTRIAL PLURALISM AS AN EXPLANATION FOR THE PREEMPTION AND ARBITRABILITY DOCTRINES

Industrial pluralism is a model of social interaction between employers and employees that eschews outside interference, envisioning workers as sufficiently empowered to fend for themselves.[304] According to this model, the NLRA establishes a framework through which employees can organize, thus acquiring the bargaining power necessary to demand better wages and working conditions.[305] Industrial pluralism analogizes workplace relations to

---

[303] *See* Bales, *supra* note 6, at 1875-76 (noting the various federal statutes providing for protection of individual employment rights); Feller, *supra* note 17, at 978-79 ("The great bulk of working people are not organized into collective bargaining units. This group of working people does present a very large constituency and, in the absence of collective bargaining, creates great pressures for the enactment of provisions governing the terms and conditions of employment."); Summers, *supra* note 6, at 27 ("We are now beginning to acknowledge the unwelcome fact that for most employees, collective bargaining does not exist, and they have no guardian. This has motivated the judicial attacks on the employment at will doctrine and legislative initiatives to protect individual employees.").

[304] *See, e.g.*, Shulman, *supra* note 157, at 1007 (arguing that the collective bargaining process and the grievance procedures created therein constitute an "autonomous rule of law"); Stone, *supra* note 6, at 622-24 (discussing the industrial pluralism metaphor as constructing a self-governing, autonomous workplace); *see also* Bales, *supra* note 295, at 162-64 (describing the industrial pluralism model and its legal embodiment in the NLRA).

[305] *See, e.g.*, Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993) ("While the diminished bargaining power of individual workers vitiated the normative force of their voluntary choice to submit to the authority of the large-scale enterprise, collective bargaining would empower workers sufficiently to cleanse that choice of duress."); Shulman, *supra* note 157, at 1000 (explaining that the NLRA established a "bare legal framework [that] is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor"); *see also* 29 U.S.C. § 151 (1994) (citing the "inequality of bargaining power" between centralized employers and employees "who do not possess full freedom of association or actual liberty of contract" as a reason that the NLRA was needed); Senator Robert F. Wagner, Address at the Confer-

miniature political democracies.[306] Employers and employees, roughly coequal, jointly negotiate and enforce an agreement that establishes the terms and conditions of employment. It is this agreement, rather than external sources of law, that creates the rights and duties of employers and employees. This process of collective bargaining, and its expressly contractarian ideology, thus gives employees a voice in decisions that significantly influence their lives.[307] The NLRA, according to the industrial pluralist model, confers no substantive employment rights, but rather establishes the framework through which employees may jointly negotiate rights on their own behalf.[308] Indeed, industrial pluralism seeks to put an end to individual bargaining and non-contractual employment rights.[309] The collective bargaining

---

ence of Code Authorities, Washington, D.C. (Mar. 5, 1934), *in* 78 CONG. REC. 3678, 3679 (1934) ("[E]mployers and employees should possess equality of bargaining power. The only way to accomplish this is by securing for employees the full right to act collectively through representatives of their own choosing.").

[306] *See, e.g.*, GOLDEN & RUTTENBERG, *supra* note 39, at 43 (analogizing the collective bargaining agreement to a constitution, and the grievance process to the common law, displacing the "corporate dictatorship" with an essentially democratic system of consensual governance); Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 276 (1948) (comparing the administrative phase of a collective bargaining agreement with administrative and judicial processes); Wm. M. Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 77 (1922) (stating that collective bargaining agreements "establish constitutional government in industry and tend toward industrial democracy"); Stone, *supra* note 6, at 622 (likening labor and management to political parties in a democracy, each with its own constituency and agenda); Summers, *supra* note 6, at 9, 26 ("Collective bargaining provides a measure of industrial democracy by providing workers a voice in the decisions affecting their working life.").

[307] *See* GOLDEN & RUTTENBERG, *supra* note 39, at 23-47 (recounting some tactics engaged in by labor and management before and after the establishment of collective bargaining); Barenberg, *supra* note 305, at 1424 (characterizing the goal of collective bargaining as "freedom for self-direction, self-control and cooperation" (quoting Senator Robert F. Wagner, *"Industry Democracy" and Corporations*, radio address at the National Democratic Club 7 (May 8, 1931))); Leiserson, *supra* note 306, at 66 ("[T]he movement [toward industrial democracy] continues, all the wage-earners together as the Commons in industry getting more and more rights and power at the expense of the Lords of Industry.").

[308] *See* Stone, *supra* note 22, at 1511 (noting that collective bargaining allows management and labor to formulate the rules that govern the workplace).

[309] *See* GOLDEN & RUTTENBERG, *supra* note 39, at 26 (arguing that all workers must give up their freedom to bargain independently in order to benefit from collective bargaining); Stone, *supra* note 6, at 624 ("The industrial pluralist interpretation of the labor laws . . . had the effect of reprivatizing labor relations. It also established a rigid barrier between the workplace and external sources of law. As a result, the collective bargaining system has not been able to accommodate the proliferating employment rights of the 1980s.").

process is thought to be adequate to protect whatever rights workers feel are worth negotiating for, and the essentially democratic nature of union representation ensures that workers' voices are adequately represented at the bargaining table.[310]

The NLRA shifted workplace sovereignty from employers and courts to employers and employees, creating a framework for the joint determination of workplace rights through the collective bargaining process.[311] Finding an internal mechanism for resolving disputes between employers and employees was critical to maintaining this shift in sovereignty.[312] Arbitration became the mechanism. In the metaphor of industrial democracy, the workplace "legislature," composed of management and union representatives, negotiated and ultimately promulgated the law, or the "constitution"[313] of the shop—the collective bargaining agreement.[314] Arbitration, as an analog to courts of law,[315] provided the mechanism by which that law was interpreted and applied. Not only did arbitration serve the instrumental function of interpreting and applying the law, it also fit the theoretical model of an autonomous system.[316] The arbitrator was chosen by, and served at the whim of,

---

[310] *See* GOLDEN & RUTTENBERG, *supra* note 39, at 43 (noting how the collective bargaining process attempts to build a body of industrial law); Stone, *supra* note 6, at 593 (noting how the NLRA creates a framework upon which to construct an agreement mutually beneficial to labor and management).

[311] *See* United Steelworkers v. Warrior & Gulf Navigation, 363 U.S. 574, 580 (1960) ("A collective bargaining agreement is an effort to erect a system of industrial self-government."). The doctrine of reserved management rights is an exception to this shift in sovereignty. The doctrine permits unilateral employer decisionmaking over issues "at the core of entrepreneurial control." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *see also* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981) (concluding that an employer has no duty to bargain over a decision to close part of its operations); Otis Elevator Co., 269 NLRB Dec. (CCH) No. 162, ¶ 16,181, at 27,640 (Apr. 6, 1984) (holding that an employer has no duty to bargain over a decision to transfer work from one facility to another).

[312] *See* GOLDEN & RUTTENBERG, *supra* note 39, at 37 (noting that in the early 1940s the role of the NLRB shifted from enforcing collective bargaining agreements to supervising elections, so that unions and management ceased to look to government for the solutions to their problems); Leiserson, *supra* note 306, at 75 (noting the shift in sovereignty from the hands of owners and managers to a democratic system).

[313] Leiserson, *supra* note 306, at 56 ("The trade agreement . . . is a form of constitutional government, with its legislative, executive, and judicial branches, its common law and its statute law, its penalties and sanctions." (quoting JOHN R. COMMONS, TRADE UNIONISM AND LABOR PROBLEMS at vii (1905))).

[314] *See Warrior & Gulf Navigation*, 363 U.S. at 581 (referring to the collective bargaining agreement as a "system of private law"); Stone, *supra* note 6, at 623 (referring to collective bargaining negotiations as the "workplace legislature").

[315] *See* Stone, *supra* note 6, at 623 (comparing private arbitration to a "workplace judiciary" that "provide[s] a neutral vantage point for enforcing [workplace] rules").

[316] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (noting the integral

the parties. The arbitrator's authority was derived exclusively from the terms of the collective bargaining agreement and from the "common law" of shop custom.[317] Arbitration thus completed the metaphor of industrial organization as a self-contained mini-democracy—"an island of self-rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders."[318]

Individual employment rights have no place in the industrial pluralist vision of an autonomous workplace. The external imposition of workplace rules by courts and legislatures represents an intrusion into the heretofore private contractual process of creating such rules by collective bargaining. It also challenges the notion that, once organized collectively, employees have the bargaining power to negotiate these workplace rules on their own. Judicial enforcement of workplace rules not only runs contrary to the ideal of a private forum for resolving workplace disputes, but also calls into question whether labor arbitration is capable of singlehandedly dispensing workplace justice. Public imposition and enforcement of individual employment rights threatens the privatized system of workplace governance that keeps workplace disputes out of the courtroom by dealing with them at the shop level.

The industrial pluralist vision finds application through the section 301 preemption doctrine in three ways. First is the willingness of courts to extinguish state law rights because of the mere possibility that enforcing these rights might have some effect on the meaning of a collective bargaining agreement. There thus exists a presumption of supremacy of private law over public law. Second is the practice of sending these rights-based claims to arbitration, even though doing so may cause a claim to disappear. It seems that the fear of judicial encroachment into private labor relations is so great that courts have considered a denial of rights preferable to having those rights litigated. Third is the refusal to permit labor arbitrators to consider external sources of law. Thus, the ideal of arbitration under an industrial pluralist regime has become so powerful that it trumps the public need for meaningful workplace regulation.

Like the section 301 preemption doctrine, the FAA arbitrability doctrine is predicated on the industrial pluralist philosophy of workplace governance.

---

role played by the arbitrator in establishing "industrial self-government"); *Warrior & Gulf Navigation*, 363 U.S. at 581 ("[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise . . . ."); Shulman, *supra* note 157, at 1007 (noting that collective bargaining agreements force the parties to handle their disputes in accordance with the contract's terms); *id.* at 1024 (noting that arbitration is "an integral part of the system of self-government").

[317] *See* Leiserson, *supra* note 306, at 56 (noting the existence of a "common law" in industrial democracy); Shulman, *supra* note 157, at 1009-15 (discussing the ways in which arbitrators may consider matters extrinsic to the written agreement).

[318] Stone, *supra* note 22, at 1515.

One illustration is the knee-jerk preference for arbitration over litigation whenever a collective bargaining agreement is involved, even when this preference is indulged at the expense of providing an adequate remedy.[319] Labor arbitration remedies are a poor version of contract damages, using a contractual approach to employment disputes even when a tort model would be more appropriate. Another example is the discretion that unions have in deciding whether to pursue an employee's grievance. This reinforces the notion that the collective bargaining relationship is a private one, and that judicial interference is inappropriate. Clearly, a new way of looking at workplace governance is needed.

IV. ALTERNATIVE MODELS OF WORKPLACE GOVERNANCE

Both collective bargaining and individual employment rights have their limitations. A primary problem with collective bargaining is that it is not universal. Even in labor's heyday, less than half of American workers were protected by collective bargaining agreements.[320] Moreover, collective bargaining offers the least to those employees who need it the most. Employees who are in high demand are protected from employer abuses by market forces, and once organized, they have little difficulty exercising their bargaining power.[321] In contrast, unskilled laborers are easily replaceable and therefore difficult to organize. Even if organized, these employees often lack the bargaining power to enable them to engage in meaningful negotiations over the terms and conditions of employment. The only way to protect them is for the law to intervene on their behalf.

The individual employment rights model, however, offers little protection to employees at the bottom of the employment ladder. As noted earlier,[322] administrative agencies have mostly failed to enforce these rights. Often, the only way in which aggrieved employees can obtain satisfaction is by filing a lawsuit. Few rank-and-file employees, however, can afford the tens of thousands of dollars it takes to litigate an employment dispute. Absent "smoking gun" evidence making a finding of liability virtually certain, or truly outrageous behavior making a large punitive damage award probable, employees are unlikely to find an attorney willing to take the case on a contingency fee basis because low wages mean low compensatory damage awards.[323] In fact,

---

[319] *See, e.g.*, Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880-82 (4th Cir. 1996); Martin v. Dana Corp., No. 96-1746, 1997 WL 313054, at *8 (3d Cir. June 12, 1997), *withdrawn for reh'g en banc* (July 1, 1997).

[320] *See supra* note 23 and accompanying text.

[321] Examples include professional athletes and airline pilots.

[322] *See supra* notes 297-99 and accompanying text.

[323] *See* Summers, *supra* note 283, at 468 ("Lower income employees without substantial tort claims will have difficulty finding a lawyer."); *see also* James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2218 (1993) (discussing how access to the legal system is limited to those

reported cases confirm that relatively few plaintiffs are hourly wage or clerical workers; most are professionals, executives, or middle and upper management employees.[324] For most employees, then, individual employment rights are an illusion.[325]

A. *The Legal-Litigative Approach*

Despite the significant shortcomings of the individual employment rights model, most commentators criticizing the preemption and arbitrability doctrines have proposed an expansion of the model as part of a possible solution. Commentators writing about section 301 preemption generally conclude that preemption is too broad and that courts should permit employees to litigate the legal claims that are currently preempted.[326] Commentators writing about FAA arbitrability generally conclude that too many legal claims are being sent to arbitration and that courts should permit employees to litigate the claims that are currently arbitrated.[327] In the end, most commentators

---

who can afford to pay the high cost of litigation); Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 412 (1993) ("Because [lower-skilled, entry-level] jobs typically pay lower wages, the plaintiff may have difficulty paying a lawyer.").

[324] *See* DERTOUZOS ET AL., *supra* note 287, at 20-21 (providing statistics on employee plaintiffs).

[325] For a more detailed discussion of the difficulties low-income employees have enforcing individual employment rights through litigation, see BALES, *supra* note 296, at 154-57.

The individual employment rights model is an inadequate form of workplace governance for other reasons as well. First, "providing individual employment rights without a union does not allow employees to participate in corporate decisionmaking." Stone, *supra* note 6, at 637; *see also* Summers, *supra* note 6, at 26 ("As we substitute reliance on legal regulation for reliance on collective bargaining, the task will surely test our ingenuity and willingness to break out of old molds in finding answers to how we can construct a system of worker participation where there is no collective bargaining."). Second, the universality of these rights makes it impossible to tailor them to local circumstances or preferences. *See* Stone, *supra* note 6, at 637 ("[M]inimal terms are too uniform and rigid to address the preferences of employees at all workplaces; they cannot accommodate local differences."). Third, unorganized workers form a very weak political constituency, meaning that these rights can at any time be repealed or judicially negated. *See id.* at 638.

[326] *See, e.g.*, Stein, *supra* note 82, at 61 ("[S]ection 301 preemption hurts the states by thwarting their legitimate employment policies . . . [and] it hurts employees by depriving them of rights and remedies they otherwise would have had."). For an exception, see Stone, *supra* note 6, at 638-43 ("Employees who are not in unions are not organized into a political constituency that can protect the [legislatively imposed] minimal terms in the future. Without an organized constituency, any minimal terms enacted can always be repealed or negated through judicial interpretation.").

[327] *See, e.g.*, Christine Godsil Cooper, *Where Are We Going With* Gilmer*?: Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV.

propose some version of what I call the "legal-litigative" approach, an approach that would permit all employees, regardless of union membership, to enforce all of their legal rights through litigation.

The legal-litigative approach is a significant departure from the industrial pluralist ethos of workplace autonomy. This approach would give union employees two wholly distinct sources of employment rules—a public source, conferred by individual employment rights, and a private source, consisting of the collective bargaining agreement. Individual employment rights would thus serve as a baseline bargaining position from which unions could obtain additional rights and privileges—an improvement upon the either/or proposition with which employees are faced today. This approach might be achieved through judicial relaxation of the section 301 preemption doctrine and a recognition that the FAA arbitrability doctrine should not apply to arbitration clauses found in collective bargaining agreements.

One criticism of the legal-litigative approach is that uniformity in the interpretation of collective bargaining agreements might be compromised. It is, however, difficult to understand why this is a serious concern. There is simply no support for the proposition that employers will refuse to sign multistate collective bargaining agreements merely because courts in one state impose higher minimal terms on the employment relationship than courts in another, or because different courts might interpret collective bargaining agreements differently in resolving claims arising under the laws of different states. For instance, some but not all states imply a duty of good faith and fair dealing into every contract, but no one argues that this hinders interstate commerce. There are ample means for preserving a core of uniformity without eviscerating state law rights in the process—use of federal common law to govern contract interpretation interstitially is only one example.[328]

Another criticism of the legal-litigative approach is that a legal right to sue is meaningless to employees who cannot find a lawyer to take up their claim. An approach is needed that transcends not only industrial pluralism, but also the assumption that the collective bargaining and individual employment rights models are mutually exclusive approaches to protecting employees. I believe that this can be accomplished by synthesizing elements of each model in a way that both enhances collective representation and maximizes enforcement of individual employment rights. I call my approach the

---

203, 241 (1992) ("Employment discrimination suits can be arbitrated, but more care must be utilized in the conception of an arbitration system than the *Gilmer* Court understood. There must be a mechanism for the rediversion of issues of public policy back into the courts.").

[328] *See, e.g.*, Drummonds, *supra* note 42, at 581 (noting that, to achieve uniformity, courts need be only required "to decide state law individual rights claims in a manner consistent with the federal common law of labor contracts"); Stein, *supra* note 82, at 24-41 (discussing potential mechanisms for ensuring uniformity in the interpretation of collective bargaining agreements).

"comprehensive-arbitral" approach.

B. *The Comprehensive-Arbitral Approach*

This approach would give labor arbitrators the authority to adjudicate legal rights and require them to award the full panoply of damages that would have been available had the claim been brought in court. In effect, unions—and through them employees—would agree to submit all claims to arbitration under the grievance process established by the collective bargaining agreement. This approach could be implemented by expanding, either by judicial doctrine or statutory codification, the FAA arbitrability doctrine and by eliminating the current judicial/arbitral doctrine prohibiting labor arbitrators from deciding cases based upon external sources of law.

The comprehensive-arbitral approach would recognize both public and private employment rights, but would enforce agreements to use the purely private mechanism of arbitration for their enforcement. The problem of section 301 preemption would disappear, as would that of the inadequate remedies available in cases sent to arbitration under the FAA. All causes of action would be decided at one time in one forum—another significant advantage over the bifurcated legal-litigative approach.

It is important to distance this approach from the current debate over whether employers should be permitted to require nonunion employees to agree to arbitrate prospective statutory claims as a precondition of employment, and whether such arbitration agreements should be judicially enforceable.[329] Some issues obviously overlap, such as whether arbitration is a procedurally adequate forum for deciding complex statutory claims. Arbitration in the nonunion setting, however, presents its own unique set of concerns, one of the most important of which is the employer's status as a repeat player.[330] This concern does not apply when employees are represented by a union because both the union and the employer participate in arbitration with

---

[329] *See supra* note 161.

[330] *See* Alleyne, *supra* note 161, at 426 ("Arbitrators will likely receive successive arbitration assignments from the same employer with far greater frequency than they will arbitrate for the same individual employee claimant. Consequently . . . employers will naturally dominate the arbitrator selection process, as individual employees will generally lack the resources to participate effectively in it."); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 476-79 (1996) (discussing the advantages that are presented to employers by virtue of their position as "repeat players" in arbitration). The employer's status as a repeat player gives it two distinct advantages over nonunion employees. First, the employer is likely to have more and better information about proposed arbitrators, allowing the employer to choose an arbitrator who is more likely to render a decision favorable to the employer. Second, the arbitrator's knowledge that the employer is more likely than the employee to have an opportunity to hire the arbitrator to arbitrate a successive case may, consciously or subconsciously, induce the arbitrator to favor the employer in the case presently before her.

equal frequency.

1. Advantages

a. *Access to Adjudicatory Forum*

The first advantage offered by the comprehensive-arbitral approach is that it gives employees access to a meaningful adjudicatory forum. As discussed above, one of the principal failings of the litigation system is that it is too expensive, leaving most employees with no way to enforce their legal rights. In the union context, arbitration solves that problem because it costs far less than litigation[331] and because unionized employees can spread the costs among themselves through union dues.

b. *Enhancement of Organized Labor*

A second advantage is that the comprehensive-arbitral approach enhances the attractiveness of organized labor, especially to the low-income employees who are most in need of organization. The current section 301 preemption doctrine essentially forces employees to choose between union representation and retention of many individual employment rights. The comprehensive-arbitral approach, on the other hand, would recognize these rights and require that they be arbitrated.

Because high-income employees might prefer the opportunity to litigate their claims, the comprehensive-arbitral approach would give them a disincentive to organize. Most high-income employees, however, are not protected by the NLRA because of that Act's exemption of supervisory and managerial employees.[332] This disincentive to organize would thus primarily affect those high-income employees whose organizational rights are unprotected by current law and who least need protection. Low-income employees would, however, benefit significantly from the opportunity to pursue these rights through arbitration. Labor's ability to provide an effective mechanism for the enforcement of legal rights could be a potent selling point in union election drives. This is particularly true since the employees most in need of legal protection—such as women and minorities—are precisely the same employees that organized labor traditionally has had the most difficulty recruiting.[333]

---

[331] *See* BALES, *supra* note 296, at 157; ELKOURI & ELKOURI, *supra* note 158, at 19 ("The total cost of arbitration can be (and often is) considerably less than the cost of taking the dispute to court."); *ADR Techniques Gaining Favor in Non-Traditional Settings*, Daily Lab. Rep. (BNA), at 2 (Mar. 15, 1993).

[332] *See* 29 U.S.C. § 152(11) (1994) (excluding "supervisors" from the definition of "employees" covered by the NLRA); NLRB v. Yeshiva Univ., 444 U.S. 672, 674 (1980) ("Supervisors and managerial employees are excluded from the categories of employees entitled to the benefits of collective bargaining under the [NLRA].").

[333] *See supra* note 32 and accompanying text.

c. *Preservation of Employment Relationship*

The third advantage offered by the comprehensive-arbitral approach is that it maximizes the possibility that legal disputes will be solved without destroying the employment relationship. Employment litigation can take up to three to five years,[334] and cases lasting more than a decade are not unheard of.[335] During years of litigation, what may have started out as a misunderstanding or a mistake that could have been remedied by an apology, reinstatement, and a few thousand dollars in lost wages, may have turned into a battle of epic proportions. The investment of hundreds of hours and thousands of dollars into litigation makes it unlikely that participants on opposite sides of employment litigation will be able to work together again. By contrast, labor arbitration can be completed within a few months of the incident giving rise to a claim.[336] The less formal nature of the process permits the majority of participants to resume the employment relationship as before.

2. Concerns

a. *Adequacy of Arbitral Forum*

One potential concern is that arbitration provides a procedurally inadequate forum for the resolution of statutory rights. Four important procedural

---

[334] As of 1989, the median time between the filing of an employment lawsuit and trial—not including appeals—was fourteen months; ten percent of cases lasted more than three years. *See* DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. app. I at 212-15 tbl.C-5 (1989) (detailing average intervals from filing to final disposition of cases brought before federal district and circuit courts). For cases concluded before trial—for example, by settlement or summary disposition—the median time between filing and disposition by the trial court was eight months; ten percent of cases lasted more than twenty-eight months. *See id.* The pre-suit administrative review process conducted by federal and state equal employment opportunity agencies can add another year if the employee or her attorney truncates the agency's investigation by requesting an early right-to-sue letter; the process can add an additional two to four years if the employee allows the agency to conduct a full investigation and to attempt conciliation. *See* Summers, *supra* note 283, at 481 ("The average case [brought before the EEOC] spans more than 600 days from the filing of a charge until the case is referred to the General Counsel to prepare to bring suit. This is the average processing time; some stages may take twice as long."). "Even successful plaintiffs may wait for years to recover damages as the case is kept alive in the court of appeals." Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 284 (1996).

[335] *See* Summers, *supra* note 283, at 488 (noting that if there are appeals, employment litigation may last up to ten years).

[336] *See* ELKOURI & ELKOURI, *supra* note 158, at 9 & n.36 (noting a study that found "the average number of days required from the time a grievance was filed until an arbitrator's award was rendered was 223.5 days in 1978 and 268.3 days in 1977").

rights are waived by an agreement to arbitrate. The first is trial by jury. An arbitration agreement vests the arbitrator with full authority to decide all issues of fact, law, and damages. Employers generally favor this transfer of authority because they perceive juries as being less predictable than judges or arbitrators.[337] They also believe that because jurors are the "peers" of employees, they are far more likely to find liability or award excessive damages than judges or arbitrators. Fear of juries increases the amount that employers are willing to pay to settle a case and increases the bargaining power of employees in settlement negotiations. By eliminating jury trials, arbitration makes it less likely that an employee will receive a large pre-arbitration settlement, and thus presents a significant advantage to employers.

The second waived procedural right is that of full discovery. Generous discovery is absolutely crucial to the employee in most employment cases because the employer's personnel files contain most of the information that the employee needs to prove her case.[338] Arbitral discovery, however, is

---

[337] *See* Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 633 (1994) ("Many employers believe that jurors (1) are the 'peers' of employees not employers; (2) often decide cases on the basis of sympathy rather than whether a violation of employment law has occurred; (3) often award excessive punitive damages . . . ; and (4) are unpredictable.").

Employers often believe that jury decisions are less likely to have a sound basis in the facts of the case than a decision made by a judge or arbitrator. This may, to some extent, be true. The presentment of "facts" in the courtroom is hardly a model for effective communication, and may easily result in jury confusion or an inadequate grasp of what is relevant or important. Moreover, a person is not likely to serve on a jury in an employment case any more than once in a lifetime; judges and arbitrators see such cases regularly. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 124 (Dover Publications 1991) (1881) ("A judge who has long sat as *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury.").

Many employers believe that jurors are likely to award substantial damages to a sympathetic plaintiff regardless of the legal merits of the case. One study on the outcome of employment cases found that juries find for plaintiffs twice as frequently as when judges acted as factfinders, although in jury trials the employee prevailed only 38% of the time. *See* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1137-38, 1140-41, 1175 (1992) (providing the results of a study of plaintiff win rates and recoveries in civil cases tried before juries and judges "which demonstrate that plaintiffs do not always do better when their cases are tried before juries"); Howard, *supra* note 298, at 42 (citing Price Waterhouse Law Firm & Law Department Services Group, 1993 Law Department Spending Survey of 201 Major Companies). *But see* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 503 (1995) ("The little empirical evidence that there is suggests that juries are no more favorable to plaintiffs on the issue of liability than judges, although they might make larger awards of damages once they find liability.").

[338] *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74

limited because arbitration derives its advantages of speed and low cost in large part from the fact that discovery arbitration is less extensive than in litigation.[339] Although most arbitral procedures do authorize some discovery, this is generally at the discretion of the arbitrator.[340] Any restrictions on discovery are likely to benefit the employer at the expense of the employee.[341]

The third right that employees waive by agreeing to arbitrate is the application of the rules of civil procedure and evidence to their dispute. Parties to arbitration agree to forego these rules in exchange for the informality and expedition of arbitration.[342] When both employer and employee are represented by able counsel, the presence or absence of formal rules is probably a wash. Where the employee cannot find representation, however, the presence of formal rules can make it almost impossible for the employee to pursue her claim. Most law students spend at least three semesters studying the rules of civil procedure and evidence, and even then, they must undergo a substantial amount of practical training or mentoring before they are able to

---

TEX. L. REV. 1655, 2670 (1996) (noting that employers possess a unique advantage in that they "create[ ] and control[ ] virtually all of the relevant documents"); Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 662 ("[T]he [*Gilmer*] Court seemed to play down any concern for the prevailing limits upon discovery in arbitration. The Court stated that these limits were to some extent counterbalanced by the fact that arbitrators typically are not bound by the rules of evidence . . . ."); Turner, *supra* note 334, at 289 ("Limitations on discovery [often found in arbitration agreements] generally benefit the employer, the party with access to the critical information the plaintiff needs to prove her case."); *see also* Mark E. Bunditz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 284 (1995) ("Arbitration's restrictions on discovery may be particularly detrimental to consumers in certain types of disputes."); Sternlight, *supra* note 251, at 683-84 (discussing how companies can prevent consumers from engaging in adequate discovery by dictating the structure of arbitration).

[339] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991) (noting that parties to an arbitration agreement trade the formalities and comprehensive discovery provisions of judicial procedure for the less formal and more expedited discovery procedures of arbitration).

[340] *See* AMERICAN ARBITRATION ASS'N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES Rule 7, at 12-13 (1996) ("The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute.").

[341] *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelling Arbitration*, 1997 WIS. L. REV. 33, 61.

[342] *See* Drinane v. State Farm Mut. Auto. Ins. Co., 606 N.E.2d 1181, 1183 (Ill. 1992) (noting that although arbitrators are not required to adhere to the rules of procedure, evidence, or discovery of legal proceedings, "[t]hese differences are sanctioned because the parties willingly accept the absence of these safeguards in return for a final and speedy resolution of their conflict").

litigate a case competently on their own. Even if it is theoretically possible for a *pro se* plaintiff to navigate the complex rules governing pretrial and trial procedures, anecdotal evidence suggests that most people in that situation correctly perceive that the deck is stacked heavily against them, and consequently do not even attempt to pursue their claims.

The final procedural right compromised by arbitration is the right to appeal.[343] Restrictions on the right to appeal effectively make the arbitral award final, eliminating a lengthy and expensive appellate process. Currently, courts will not overturn arbitral decisions involving statutory claims merely because the arbitrator incorrectly interpreted or applied the law.[344] Rather, courts will only reverse an arbitrator's award if the arbitrator acted in "manifest disregard of the law."[345] This judicially created standard is an addition to the statutory grounds set forth in the FAA for vacating an award.[346] It requires a showing that "the arbitrator understood and correctly stated the

---

[343] *See generally* Anthony J. Jacob, Note, *Expanding Judicial Review to Encourage Employers and Employees to Enter the Arbitration Arena*, 30 J. MARSHALL L. REV. 1099 (1997).

[344] *See, e.g.*, Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995) ("Factual or legal errors by arbitrators—even clear or gross errors—'do not authorize courts to annul awards.'" (quoting Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994))); Ainsworth v. Skurnick, 960 F.2d 939, 940 (11th Cir. 1992) ("[A]lthough great deference is normally accorded an arbitration award, an award that is arbitrary or capricious is not required to be enforced . . . . An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case."); Robbins v. Day, 954 F.2d 679, 683 (11th Cir. 1992) ("Before a court may vacate an arbitration award on the basis of manifest disregard of the law, 'there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.'" (quoting O.R. Sec. v. Professional Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988))); Republic of Korea v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972) ("[A]n award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law.").

[345] The manifest disregard of the law standard was first mentioned in dictum by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). The *Wilko* Court recognized a limited power to vacate arbitration awards, but stated that:

> While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of [applicable law] would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear . . . . [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

Id. (footnotes omitted).

[346] *See* 9 U.S.C. §§ 10-11 (1994) (setting forth grounds for vacating arbitral awards); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jarros, 70 F.3d 418, 421 (6th Cir. 1995) ("[There is] an alternative to the[ ] statutory grounds [for vacating arbitral awards], a separate judicially created basis for vacation obtains where the arbitration award was made 'in manifest disregard of the law.'" (quoting *Wilko*, 346 U.S. at 436)).

law but proceeded to ignore it . . . ."[347] Although dozens of cases discuss and define the "manifest disregard" standard, arbitration awards are rarely, if ever, vacated on this ground.[348]

Restrictions on the right to appeal, like restrictions on other procedural rights, represent a tradeoff between substantive justice, which is presumably enhanced by procedural formality,[349] and access to an adjudicatory forum, which can be increased by reducing the costs of adjudication. A decision to enforce individual employment rights through litigation guarantees the availability of certain procedural rights, but at the expense of denying meaningful protection to employees who cannot afford litigation. Nevertheless, where a union is available to ensure that the arbitral process is not mere window dressing to hide employer abuses, I believe that most employees would be better off having their statutory employment rights decided in arbitration.

b. *Parity of Interests Between Unions and Individual Members*

The assumption that the presence of a union will help guarantee the efficacy of an arbitral forum raises a concern discussed earlier: that a union might, for a variety of reasons, fail to pursue a legitimate claim. When an employee asserts a claim arising from a right created by a collective bar-

---

[347] Siegel v. Titan Indus. Corp., 779 F.2d 891, 892-93 (2d Cir. 1985) (quoting Bell Aerospace Co. v. Local 156, Int'l Union, United Auto. Workers, 356 F. Supp. 354, 356 (W.D.N.Y. 1973)); *see also* Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 239 (1st Cir. 1995) ("[A]ribtration awards are subject to review 'where it is clear from the record that the arbitrator recognized the applicable law—and then ignored it.'" (quoting Advest Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990))); Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992) (holding that to vacate an arbitration award for manifest disregard of the law, "it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did").

[348] *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 776 (1996) ("[A] review of the relevant circuit court case law reveals that despite 'scattershot' attacks on adverse decisions often mounted under the imprimatur of the 'manifest disregard' of the law standard, no commercial arbitration award has been vacated on this ground."); *see also* Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 252 (1993) ("[A]lthough the 'manifest disregard' of the law standard has been discussed in dozens of cases involving judicial review of arbitration awards resulting from securities disputes, no cases have been identified wherein vacation of a securities arbitration award has been clearly upheld on appeal.").

[349] *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388 ("[T]he formalities of a court trial—the flag, the black robes, the ritual—remind those present that the occasion calls for higher 'public' values rather than the lesser values embraced during moments of informality.").

gaining agreement, it is appropriate for courts to give the union discretion in deciding whether to pursue the claim. The collective best interest of union members may lie in not pursuing the claim if to do so would jeopardize relations either with the employer or between union members. On the other hand, when an employee asserts a claim arising from an individual right created by statute, such as the right to be free from racial discrimination, the argument for union discretion is much weaker. In this situation, there is a public interest in enforcing the statutory mandate and eradicating invidious discrimination that rises above the self-interest of the members of a particular union.

If legal claims are to be arbitrated under the auspices of a union, then some mechanism will be necessary to ensure that such claims are adequately pursued. This could be accomplished in either of two ways. First, the amount of discretion the law currently affords unions in deciding whether to pursue a grievance could be reduced with regard to legal claims. This would give employees a claim against the union for failure to provide adequate representation and give unions an incentive to pursue such claims vigorously.

A second solution would be to give employees the opportunity to take control of their case from the union. Arbitration would still be required, but the employee would be able to choose her legal counsel and direct how her case should be argued. A screening device would be necessary to prevent employees from taking control of run-of-the-mill grievances, or grievances that the union legitimately decided not to pursue because the employee's case was weak. This could be accomplished by requiring employees who take control of their case to pay their share of the arbitration expenses. The cost differential between litigation and arbitration would still leave them significantly better off than under the current litigative system.

c. *Appropriate Damage Awards*

A final difficulty with the comprehensive-arbitral approach is the tendency of labor arbitrators to avoid awarding tort and punitive damages even when they have clear authority to award such damages. This ingrained attitude will not disappear by mere fiat. For this reason, new judicial doctrine encouraging arbitrators to award supra-contractual damages likely would be ineffective. Legislation is needed that would direct arbitrators to award extra-contractual damages in cases in which such an award is appropriate.

CONCLUSION

The American model of workplace governance has shifted from a paradigm centered on collective bargaining to one centered on individual employment rights. Though the paradigms are not necessarily mutually exclusive, the trend toward individual rights clearly has come at the expense of collective bargaining. This is because courts have used the section 301 preemption and the FAA arbitrability doctrines to eviscerate or diminish individual rights of unionized employees, thereby imposing a substantial penalty

on union membership. These doctrines, though of disparate legal derivation, have a common theoretical origin. They stem from the industrial pluralist perspective on collective bargaining, a perspective that envisions workplace governance as an entirely private affair and therefore sees no room for interference by the external promulgation or enforcement of work rules.

Most commentators critiquing the preemption and arbitrability doctrines have concluded that the solution is to expand the ability of employees to litigate their employment claims. The problem with this approach is that it replicates the worst feature of the individual employment rights model—the inaccessibility of litigation to all but highly-paid employees. This Article has proposed a different approach, one that recognizes collective bargaining and individual employment rights as compatible and mutually reinforcing. This new approach would both expand the accessibility of a meaningful adjudicatory forum to a wider spectrum of employees, and enhance the attractiveness of organized labor to those employees most in need of organization. Without such a pragmatic approach to workplace governance, we risk leaving the American workforce without meaningful employment protection.