Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption

Laura W. Stein*

Federal and state courts continue to struggle with the issue of when to preempt state employment laws under section 301 of the Labor Management Relations Act. The struggle is seen within the decisions of the Supreme Court. Just within the past decade the Supreme Court has used several tests to determine whether a state law should be preempted. The Court however, has been more consistent with its two policy considerations used for justifying preemption: the need for a uniform law to govern the interpretation of collective bargaining agreements and the need to preserve the central role of arbitration. Professor Stein, in this article, contends that the problem with the current doctrine of section 301 preemption goes beyond the confusion stirred in the lower courts by erratic Supreme Court holdings. More importantly, the policy considerationsjustifying this doctrine do not require a curtailment of individual employment rights created by state law. Stein argues that curbing preemption would not clash with the need for uniform laws on the interpretation of collective bargaining agreements if courts adjudicating state-law claims are required to use federal law inter-stitially whenever such interpretation issues arise; in addition, the central role of arbitration would not be seriously threatened because most individual disputes would still be resolved through arbitration, and employers would still have incentives to agree to arbitration clauses. Consequently,


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the current preemption scheme should largely be discarded to avoid federal interference with legitimate state interests and to be fairer to individual employees covered by collective bargaining agreements.

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I

INTRODUCTION

Traditionally, when a unionized employee had a dispute with her employer, she relied on her union for assistance. If a collective bargaining agreement were in force, she would turn to the union to pursue a grievance
against the employer under the procedures specified by the agreement, which would often culminate in arbitration.

This seemingly obvious practical principle of labor law is eroding, however. For the past few decades, states have created a significant body of law protecting individual employment rights that, on its face, is available to all employees in the state regardless of whether they are represented by a union. These rights can be enforced in court by the employee acting alone, without union assistance. Sometimes state law provides substantive rights that are greater than the private rights created by the collective bargaining agreement. In other cases, the employee may have the same substantive right under both law and contract, but state law may provide either greater remedies or such procedural advantages as a longer period in which to bring a claim and the right to a jury trial.

For the past decade, courts and commentators have debated whether and when employees whose employment is covered by a collective bargaining agreement should be permitted to pursue state-law individual employment rights claims. As a doctrinal matter, the issue is one of potential preemption of state law by section 301 of the Labor Management Relations Act ("LMRA"), a statute that provides the federal courts with jurisdiction over suits to enforce labor contracts. The Supreme Court has interpreted section 301 as authorizing the federal courts to create a body of federal common law governing the enforcement of collective bargaining agreements. The preemption argument, which the Supreme Court has accepted, is that allowing covered employees to bring certain state law claims would conflict with the purposes behind having this federal common law. Specifically, the Supreme Court has argued that permitting such suits could undermine the goal of having a single uniform law to govern the interpretation of collective bargaining agreements, and could undermine the role of the arbitrator as the principal interpreter of such agreements.

Although the Supreme Court has been clear in holding that some state employment laws are preempted by section 301 when asserted by employees covered by collective bargaining agreements, it has not clearly defined the universe of preempted claims. In its numerous opinions on the subject over the last decade, the Court has shifted erratically among different tests for deciding which state laws cannot survive, sometimes shifting between several in a single opinion. This confusion has engendered substantial litigation. In 1994, for example, courts decided approximately 76 cases involving section 301 preemption issues. For this reason alone, this is an area of law that calls out for reform.

3. See infra notes 8-15 and accompanying text.
4. This number was obtained by searching for section 301 preemption cases in the LEXIS "Mega" file. It probably understates the true number of cases, however, since not all cases involving
But the problem with the current doctrine is not merely its confusion. More importantly, the current scheme is not justified by the policies that the Supreme Court relied upon in creating it. Consequently, courts end up unnecessarily preempting state law. This does a disservice both to the states, which have a strong interest in regulating employment, and to the employees who seek to rely on the state created rights.

This article will argue for dismantling section 301 preemption. Employees should be allowed freely to take advantage of state law individual employment rights, regardless of whether the terms and conditions of their employment are governed by a collective bargaining agreement. The only laws that should be preempted under section 301 are state contract laws that otherwise could be used to enforce collective bargaining agreements themselves.

Part II of this article discusses the contradictions among the Supreme Court's pronouncements with regard to section 301 preemption, demonstrating the need for reform. In Part III, I will explain how preempting state individual employment rights claims harms both states and individual employees, and I will conclude that preemption should not occur unless permitting the state claims to be adjudicated would interfere seriously with federal policy. In Part IV, I will explore the two policy reasons behind the Court's application of section 301 preemption to state laws guaranteeing individual employment rights. I will argue that permitting state individual employment rights claims to proceed will not seriously undermine either of these policies. In Part V, I will address and diffuse a couple of other possible policy arguments in favor of section 301 preemption: without preemption, employees will abandon their unions, and broad preemption of state law claims is necessary to protect employers with multi-state operations. Finally, in Part VI, I will explore the practical ramifications of undoing the doctrinal expansion. I will explain how courts should analyze specific types of state-law individual employment rights claims brought by unionized employees, such as claims that the union breached a duty to keep the workplace safe or claims that the employer wrongfully discharged the employee.

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section 301 preemption issues are necessarily reported in LEXIS. Furthermore, this number does not include preemption cases decided under the Railway Labor Act, 45 U.S.C.A. §§ 151-163, 181-188 (West 1986), the labor statute that applies to employees in the railway and airline industries. The principles of preemption under the Railway Labor Act are the same as those under section 301 of the LMRA. See Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239, 2247-49 & n.9 (1994).

In 51 of these 76 cases, the court found at least one preempted claim. In sixteen cases, the court found no preemption. The remaining nine cases were decided on other grounds.
II
THE CONTRADICTIONS IN THE CURRENT DOCTRINE

On its face, section 301 of the LMRA simply gives the federal courts jurisdiction over suits to enforce collective bargaining agreements. The Supreme Court, however, quickly held that section 301 is more than a bare jurisdictional grant. Instead, the Court read it as a mandate for the federal courts to develop a federal common law of labor contracts to apply in suits brought to enforce collective bargaining agreements. Soon afterward, in Teamsters v. Lucas Flour, the Court declared that federal law in this area is exclusive, regardless of whether the suit to enforce the collective bargaining agreement is brought in state or federal court. Thus, state contract law is preempted to the extent that it would otherwise enforce and govern the interpretation of collective bargaining agreements.

In favor of preemption, the Court reasoned that there must be one uniform law that applies to any given labor contract. Otherwise, it would be difficult for parties to negotiate an agreement, it would be difficult for parties to resolve differences that arise during the contract term, and parties would be unwilling to "agree to contract terms providing for final arbitral or judicial resolution of disputes." A couple of decades later, in Allis-Chalmers Corp. v. Lueck, the Supreme Court expanded section 301 preemption to preempt certain tort claims brought by individual employees who are covered by collective bargaining agreements. To justify expanding preemption to apply to individual employment rights claims, the Court first invoked the policy reason given in Lucas Flour: the need for a uniform law to govern interpretation of the terms of a collective bargaining agreement. The Court reasoned that this purpose would be undermined if employees could recast their claims that the employer violated the collective bargaining agreement into claims for "tortious breach of contract," with state law providing the interpretive principles.

5. Section 301(a) simply provides that:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
7. Id.
8. 369 U.S. 95 (1962).
9. Id. at 103-04.
10. Id.
12. Id. at 211.
13. Id.
And the Court added a second reason for preemption as well—the need to "preserve... the central role of arbitration in our 'system of industrial self-government.'" The Court feared that allowing unionized employees to seek redress for employment-related claims in court would undermine the arbitrator's role as the primary interpreter of most labor agreements. This could happen in two ways. First, courts would resolve particular employment disputes that the arbitrator could have resolved, permitting the court, rather than the arbitrator, to construe the collective bargaining agreement. Second, under such a scheme, employers would have little incentive to agree to arbitration clauses, since, in practice, employees could easily disregard them by bringing suit under state individual employment rights laws.

In its subsequent cases on section 301 preemption, the Court has not added any new policy reasons for preemption. Instead, it has merely reiterated one or both of the reasons already described.

In expanding section 301 preemption to apply to certain individual employment rights claims asserted by employees covered by collective bargaining agreements, however, the Court did not clearly define the test for preemption. There is language in Lueck that can suggest any of three possible tests, and subsequent case law has not served to clarify matters. Sometimes the Court has indicated that the key preemption inquiry is whether state law makes the state right negotiable and thus potentially subject to waiver through the collective bargaining agreement; if so, then the right should be preempted. On other occasions, the Court has indicated that the real question is whether resolution of the state law claim depends on the collective bargaining agreement. The requirements of this "dependence" test, however, have been interpreted in two different ways. Under one inter-

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14. Id. at 219 (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960)).
15. Id. at 219-20.
16. The Supreme Court cases involving section 301 preemption fall into two categories—suits against employers and suits against unions. In suits against employers, the Court has invoked both policy reasons to justify the doctrine. See Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 409 (1988) ("[S]ection 301 preemption... ensures that federal law will be the basis for interpreting collective-bargaining agreements."); id. at 411 (discussing need to "preserve the effectiveness of arbitration"); Livadas v. Bradshaw, 114 S. Ct. 2068, 2077 (1994) (section 301 preemption is necessary "lest common terms in bargaining agreements be given different and potentially inconsistent interpretations in different jurisdictions."); id. (section 301 preemption was developed "in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution."). In contrast, in suits against unions, the Court only mentioned the purpose of preserving a uniform law to govern the interpretation of collective bargaining agreements. See Int'l Bd. of Elec. Workers v. Hechler, 481 U.S. 851, 856-58 (1987); United Steelworkers of Am. v. Rawson, 495 U.S. 362, 371 (1990). It did not mention the centrality of arbitration as a reason for preemption, because that concern is irrelevant on the facts of such cases. Collective bargaining agreements generally do not give employees a right to arbitrate disputes with the union.
17. See infra notes 21-32 and accompanying text.
18. See infra notes 33-43 and accompanying text.
pretation, the Court apparently holds that preemption is not warranted if the state law right at issue is an independent public law right that can exist in the absence of any particular contractual arrangement; the right is preempted only if it derives from the collective bargaining agreement.\textsuperscript{19} Under the other interpretation the Court seems to hold that preemption is required if resolution of the claim would require a court to interpret the collective agreement in a more than de minimis way.\textsuperscript{20}

\textbf{A. The Negotiability Test}

The Supreme Court's first announced test for determining which state law claims are preempted asks whether the right asserted by an employee covered by a collective bargaining agreement is negotiable as a matter of state law.\textsuperscript{21} Specifically, in \textit{Lueck}, the Court drew a distinction between rights that can be "waived or altered by agreement of private parties"\textsuperscript{22} and those that cannot. The latter, "nonnegotiable state law rights,"\textsuperscript{23} are not preempted by section 301, because to rule otherwise would allow "unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored."\textsuperscript{24} Although the Court did not give examples of such non-negotiable state rights, presumably they would include such things as minimum wage and maximum hours laws.

In contrast, according to the Court, rights that are made negotiable by state law are preempted by section 301.\textsuperscript{25} Once again, the Court did not describe in detail which torts fell into this category, although it held that the tort at issue in \textit{Lueck}, which prohibited the bad-faith handling of disability insurance claims, did.\textsuperscript{26} The Court characterized this right as negotiable, presumably because the parties to the contract would have a broad right to define through their agreement the proper methods for handling payment of disability claims.\textsuperscript{27}

\textsuperscript{19.} See infra notes 44-68 and accompanying text.
\textsuperscript{20.} See infra notes 69-83 and accompanying text.
\textsuperscript{22.} 471 U.S. at 213.
\textsuperscript{23.} Id.
\textsuperscript{24.} Id. at 212.
\textsuperscript{25.} Id. at 213.
\textsuperscript{26.} Id. at 216-19.
\textsuperscript{27.} The Supreme Court derived this distinction between negotiable and non-negotiable rights from its earlier decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which dealt with the relationship between collectively bargained rights and individual employment rights guaranteed by federal law. \textit{Lueck}, 471 U.S. at 213 n.8 (citing \textit{Alexander}, 415 U.S. at 51). In \textit{Alexander}, an employee whose employment was governed by a collective bargaining agreement that prohibited race discrimination, and that provided for arbitration of race discrimination claims, brought a grievance to arbitration arguing that his discharge was racially motivated. 415 U.S. at 39-42. The employee lost the arbitration. \textit{Id.} at 42. Nonetheless, the Supreme Court held that he could bring suit in court under federal anti-discrimination laws. \textit{Id.} at 59-60. See also Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728,
The negotiability test is a very broad test for preemption. In effect, it conclusively presumes that the union has waived all rights that are in its power under state law to waive; so long as the right is waivable, the covered employee cannot assert it. Indeed, it is even broader than this; even rights that cannot be waived entirely but that can be the subject of some negotiation are unavailable to the covered employee. For example, consider the tort at issue in *Lueck*. Under state law, the parties likely could not completely waive the right to have disability payments made in a good faith manner; if the contract provided, for example, that disability payments will be made whenever the employer feels like making them, this contractual provision presumably would be void for being against public policy. But this non-waivable, negotiable right is also preempted under the Court's analysis.

The current status of the negotiability test, however, is uncertain. In *Lingle v. Norge Division of Magic Chef, Inc.*, the Court dismissed the test as the appropriate test for section 301 preemption, declaring that even some non-negotiable rights may be preempted by section 301. As the Court stated:

> While it may be true that most state laws that are not pre-empted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpre-emption. It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for this application. Such a remedy would be pre-empted by § 301.

But in its most recent cases relating to section 301 preemption, the Supreme Court has returned to describing section 301 preemption as turning in part on whether the state law right at issue is negotiable. In two cases from the 1993-94 term that raised section 301 preemption issues, the Court stated that “[section] 301 cannot be read broadly to pre-empt non-negotia-

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28. Michael C. Harper, Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for *Lingle* and *Lueck*, 66 CHI.-KENT L. REV. 685, 741 (1990) (“[T]here is no good reason to establish a presumption under section 301 law that collective bargaining agreements are intended to waive any independent contractual rights that are within the authority of unions to waive.”).

29. E. ALLAN FARNSWORTH, CONTRACTS § 5.1, at 345-50 (2d ed. 1990) (discussing the power of courts to strike down contractual provisions that contravene public policy).


31. Id. at 408 n.7. See Harper, supra note 28, at 721 n.152 (suggesting that the Court "probably was contemplating a state law that provided an extra remedy for a violation of a collective agreement, but that the parties could not waive.").
ble rights conferred on individual employees as a matter of state law." Thus, the Supreme Court left the law in a confused state.

B. The Dependence Test

In *Allis-Chalmers v. Lueck*, the Court seemed to think that it was creating a single test for preemption under section 301. In fact, however, it was not. The Court equated non-negotiable rights with rights that are "independent" of labor agreements and, conversely, equated negotiable rights with rights that are "inextricably intertwined with consideration of the terms of the labor contract" or "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." According to the Court, the first category of rights, independent non-negotiable rights, should not be preempted, whereas the second category of rights, dependent negotiable rights, should be. In so reasoning, the Court created a second distinct test for preemption—a test of dependence.

Despite the Court's equation, the question whether a right is negotiable is different from the question whether that right is dependent on the collective bargaining agreement. A right can be negotiable, yet its resolution need not be substantially dependent on interpretation of a particular agreement. For example, consider a tortious invasion of privacy claim. Lower courts that have considered the issue have deemed that the right to privacy is negotiable and, therefore, that one can legally consent to privacy invasions by one's employer. However, in the context of a particular case involving a particular collective bargaining agreement, analysis of such a tort claim may not be inextricably intertwined with analysis of the agreement. A bare-bones agreement might contain nothing that could, even implicitly, constitute a limitation on the right to privacy.

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34. Id. at 212.
35. The relevant part of the opinion reads as follows: [s]tate-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements . . . . Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. Id. at 213 (emphasis added).
36. Id. at 220.
37. See, e.g., In the Matter of Amoco Petroleum Additives Co., 964 F.2d 706, 710 (7th Cir. 1992) ("Privacy in the workplace . . . is an ordinary subject of bargaining.") (holding that invasion of privacy claims are preempted by section 301); Utility Workers of Am., Local 246 v. Southern Cal. Edison Co., 852 F.2d 1083, 1086 (9th Cir. 1988) (holding that a privacy right to be free from drug testing is negotiable and therefore preemted).
In opposition to this, Justice Blackmun, author of the *Lueck* opinion, might argue that all negotiable rights are substantially dependent on analysis of the collective bargaining agreement, because, even if there clearly are no explicit terms on point, there might be an implicit term that needs analysis.\(^{38}\) Indeed, some commentators read Justice Blackmun's decision as espousing this argument and have endorsed it.\(^{39}\)

This argument, however, does not survive analysis. There will be cases in which neither side has any colorable argument that the negotiable right was waived or altered either implicitly or explicitly. In such cases, the court would not be called upon to interpret the contract at all. Thus, not all negotiable claims are dependent on the collective bargaining agreement. Indeed, the Supreme Court seemed to recognize this in a later case, in which it stated that "when the meaning of contract terms is not the subject of dispute," there is no preemption under section 301.\(^{40}\)

Conversely, as the Court itself later recognized, even if a state tort claim is non-negotiable, resolving a legal dispute based upon it might require interpretation of the collective bargaining agreement.\(^{41}\) For example, resolution of a claim that due wages were not paid within the non-negotiable time limit specified by state law would require a court to interpret the language of the contract setting wages to calculate the appropriate remedy.\(^{42}\) Thus, the *Lueck* opinion created confusion about what test to apply—a test of negotiability or a test of dependence.\(^{43}\)

In addition, the *Lueck* opinion was disturbingly ambiguous about what it means for a state law claim to depend on the collective bargaining agreement. Is the question whether the right asserted has its genesis in public law, rather than in the party's contractual relationship? Or is the question whether resolving the dispute would require the court to interpret the collective bargaining agreement in a substantial way?

\(^{38}\) 471 U.S. at 215.

\(^{39}\) See White, supra note 21, at 397-99, 417; Todd Brower, *Towards a Unified Accommodation of State Law and Collective Bargaining Agreements: Federalism, Public Rights and Liberty of Contract*, 26 Houston L. Rev. 389, 435-36 (1989); see also Amoco, 964 F.2d at 710 ("Even agreements that do not mention surveillance expressly may deal with the subject by implication.").

\(^{40}\) Livadas v. Bradshaw, 114 S. Ct. 2068, 2078 (1994).


\(^{42}\) Cf Livadas, 114 S. Ct. at 2079.

\(^{43}\) See John J. Coleman III, *Muddy Waters: Allis-Chalmers and the Federal Policy Favoring Labor Arbitration*, 44 Washington & Lee L. Rev. 345, 381 ("Nor would it seem, in light of the holding, that the Court in *Allis-Chalmers* intended to limit arbitral pre-emption only to claims that could, under state law, be waived in advance by contract. However a state court could read the language this way.").

1. The Public Law Version of the Dependence Test

Some courts and commentators have interpreted Lueck’s language to mean that the state law claim is not preempted so long as it embodies a public law right not created by the contractual relationship between the parties.\textsuperscript{44} I will call this the public law version of the dependence test.

There is support in subsequent Supreme Court decisions for this position. In United Steelworkers of America v. Rawson,\textsuperscript{45} for example, a majority of the Court stated the rule for preemption thus:

In Allis-Chalmers Corp. v. Lueck, supra, we held that a state-law tort action against an employer may be pre-empted by § 301 if the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement and without existence independent of the agreement.\textsuperscript{46}

Similarly, in a later case, the Court explained, “it is the legal character of a claim, as ‘independent’ of rights under the collective-bargaining agreement . . . that decides whether a state cause of action may go forward.”\textsuperscript{47}

One commentator claims that the Supreme Court’s decision in Caterpillar Inc. v. Williams\textsuperscript{48} also supports the public law version of the dependence test.\textsuperscript{49} Caterpillar is a very confusing opinion that requires some space to unpack, in order to assess the merits of this claim.

In Caterpillar, employees who had been promoted out of unionized positions alleged that the company had made oral representations to them that they could expect continued employment, and that, even if their facility closed, they would be transferred to another facility.\textsuperscript{50} Eventually, the employees were downgraded back into bargaining unit positions.\textsuperscript{51} Ultimately, Caterpillar closed their facility, and they were laid off.\textsuperscript{52}

The employees brought suit in state court alleging breach of implied individual employment contracts in violation of California state contract law.\textsuperscript{53} Caterpillar removed the case to federal court on the ground that the state law contract claims were “completely preempted” by section 301.\textsuperscript{54}

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\textsuperscript{45} 495 U.S. 362 (1990).

\textsuperscript{46} Id. at 369 (emphasis added). The majority in \textit{Rawson} summed up the Court’s earlier decision in International Brhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987), in similar terms. \textit{Id.} (“[T]he duty relied on by Hechler was one without existence independent of the collective bargaining agreement . . . .”).

\textsuperscript{47} Livadas v. Bradshaw, 114 S. Ct. 2068, 2078 (1994).

\textsuperscript{48} 482 U.S. 386 (1987).

\textsuperscript{49} See Adams, \textit{supra} note 43, at 121-23.

\textsuperscript{50} 482 U.S. at 389.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.} at 390.

\textsuperscript{54} \textit{Id.}
The doctrine of “complete preemption” provides an exception to the ordinary rules for removal jurisdiction. The federal removal statute only allows cases that could have been brought originally in federal court to be removed to federal court.55 Absent diversity jurisdiction, generally only those cases that conform to the “well-pleaded complaint rule” may be brought originally in federal court.56 The “well-pleaded complaint rule” provides that “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.”57 Consequently, removal ordinarily cannot be premised on the fact that a defendant interposes a federal defense, such as the preemption of state law by federal law.58

The Supreme Court has held, however, that the preemptive force of some federal statutes is so great that they can “completely preempt” state law.59 If this occurs, then a suit brought under state law can be removed to federal court, where that federal law will apply.60

The Supreme Court has held that section 301 is a statute that completely preempts state laws that would otherwise govern a suit for the enforcement of a collective bargaining agreement.61 Thus, any suit brought to enforce a collective bargaining agreement is considered to be a suit that arises under federal law and can be removed to federal court, even if the complaint purports to rely solely on state contract law.62 A savvy plaintiff thus cannot avoid federal jurisdiction by relying on preempted state law in its complaint.

56. Caterpillar, 482 U.S. at 392; see also Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-11 (1983).
57. Caterpillar, 482 U.S. at 392.
58. Id. at 393 (“Thus, it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff’s complaint, and even if both parties concede that the federal defense is the only question truly at issue.”); see also Franchise Tax Bd., 463 U.S. at 12, 14.
60. See Note, supra note 59, at 635.
61. See Avco, 390 U.S. at 560-62. See also Livadas 114 S. Ct. at 2077 n.16; Franchise Tax Bd., 463 U.S. at 22-24; Adams, supra note 43, at 118-19; Note, supra note 59, at 648-49.
62. Although the Court did not provide any reasoning for creating this exception to the well-pleaded complaint rule, it was likely motivated by a concern that without such an exception, employers would use the oddities of removal jurisdiction to defeat the spirit of the Norris LaGuardia Act, 29 U.S.C.A. §§ 101-115 (West 1973). The Norris LaGuardia Act limits the power of the federal courts to grant injunctions in cases involving labor disputes. Id. The Court might have feared that employers would bring suits in state court under state law to obtain injunctions against strikes in violation of collective bargaining agreements. In 1968, when the complete preemption doctrine was created, see Avco, 390 U.S. at 560-62, such injunctions would have been unavailable in federal court. See Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), overruled by Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).
In Caterpillar, a unanimous Supreme Court held that the employees' state contract claims were not completely preempted under section 301.\textsuperscript{63} The Court's decision, however, did not end the case; it merely sent it back to the state court. In that forum, Caterpillar could pursue its argument that the plaintiffs could not raise individual contract claims because any individual agreements were "subsumed into, or eliminated by, the collective bargaining agreement."\textsuperscript{64} It could base this argument on one of the other preemption doctrines that exist in labor law, besides section 301 preemption.\textsuperscript{65} Alternatively, invoking section 301, the employer could argue that the employees waived, through the collective bargaining agreement, any pre-existing contractual rights that they might have had.\textsuperscript{66} However, the Court concluded that a case is not removable merely because the employer asserts a defense that depends on the collective bargaining agreement, such as an argument that the employees' state law claims were waived by the agreement.\textsuperscript{67} Thus, 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. It is thus sometimes up to the state court to dispose of the preemption issue when deciding, for example, a claim of waiver.

\begin{itemize}
  \item \textsuperscript{63} 482 U.S. at 394.
  \item \textsuperscript{64} Id. at 396. In making this argument, Caterpillar relied on the Supreme Court's decision in J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). There, the employer sought to justify its refusal to bargain with a newly designated union (generally an unfair labor practice) on the ground that there was nothing to bargain over because it had already reached individual agreements with its workers. \textit{J.I. Case}, 321 U.S. at 334. The Supreme Court disagreed, stating 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 law of contracts applicable, and to the Labor Board if they constitute unfair labor practices.
  \item \textsuperscript{65} Id. at 339. Based on this, Caterpillar argued that the employees could not have any claims arising under individual employment contracts, because such contracts would be negated by the collective agreement. \textit{Caterpillar}, 482 U.S. at 395-96. The employees' claims could arise only under the collective agreement, since that agreement defined the totality of the contractual relationship between the parties. \textit{Id.} at 396. For a further discussion of \textit{J.I. Case}, see \textit{infra} notes 263-267 and accompanying text.
  \item \textsuperscript{66} \textit{Caterpillar}, 482 U.S. at 397. The employer could argue that the individual agreements were preempted under the doctrine announced in Machinists v. Wisconsin Empl. Relations Comm'n, 427 U.S. 132 (1976), or the one announced in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Pursuant to \textit{Machinists} preemption, federal labor law is held to preempt state laws that intrude in areas that Congress intended to be settled by the "'free play of economic forces.'" \textsuperscript{67} 427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)). Pursuant to \textit{Garmon} preemption, state laws that touch upon areas that are arguably protected or arguably regulated by the National Labor Relations Act (NLRA) are preempted. 359 U.S. at 244-45. For arguments that these preemption doctrines should be dismantled, see Eileen Silverstein, \textit{Against Preemption in Labor Law}, 24 \textit{Conn. L. Rev.} 1 (1991).
  \item \textsuperscript{67} \textit{Caterpillar}, 482 U.S. at 398.
  \item \textsuperscript{67} Id. As the Court put it:
    [T]he presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.
  \item \textsuperscript{67} Id. at 398-99.
\end{itemize}
The language of *Caterpillar* does not make it clear whether the Court is adopting the public law version of the dependence test or the other possible version—the quantum of contract interpretation version—of the dependence test, which will be discussed below. But the Court's permission for state law claims to go forward even when a defense necessitates interpretation of the collective bargaining agreement suggests that the Court is more concerned with the nature of the right that the plaintiff is asserting rather than the degree of interpretation that resolution of the claim would necessitate. This suggests that the Court is adopting the public law version of the dependence test as the test for complete preemption.

Nonetheless, the opinion leaves open the question of which test to use for ordinary preemption. After all, the Court does not spell out the standard that the state court should use in deciding the case on remand. Whether the state court should dismiss the case if a defense necessitates contract interpretation or whether the defendant should prevail only if it can demonstrate that the union actually waived the employees' rights remains an open question.

2. The Quantum of Contract Interpretation Version of the Dependence Test

The Supreme Court's decisions, however, have not always supported the public law version of the dependence test. Some of the language in *Allis-Chalmers Corp. v. Lueck*, the Supreme Court's first section 301 preemption case, suggests that the proper inquiry instead is whether more than a minimal degree of contract interpretation would be required to resolve the suit. Under this interpretation, even public law rights claims could be preempted if the court must interpret the contract in a more than de minimis way to resolve the suit. Some commentators and a majority of courts have

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68. See infra notes 69-83 and accompanying text. The best guidance that the Court gave is the statement that:

Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims “substantially dependent on analysis of a collective bargaining agreement.” Respondents allege that Caterpillar has entered into and breached *individual* employment contracts with them. Section 301 says nothing about the content or validity of *individual* employment contracts.

*Id.* at 394 (citations omitted) (emphasis added). The first sentence of that passage may suggest that the Court is adopting both versions of the dependence test—either if the right asserted is not a public law right or if analysis of it depends on interpreting the collective bargaining agreement, it is preempted. But the opinion read as a whole, with its confusing distinction between complete and ordinary preemption, is not so clear.

69. See, e.g., *Allis-Chalmers v. Lueck*, 471 U.S. 202, 220 (1985) (holding that tort claims that are “substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract” are preempted) (emphasis added).
espoused this position. I’ll call this the “quantum of contract interpretation” version of the dependence test.

This test preempts more law than the public law version of the dependence test. To see this difference in concrete terms, consider a state cause of action for disability discrimination. Under the public law version of the dependence test, this cause of action would not be preempted because the duty not to discriminate is not created by the contract. On the other hand, the court may be called upon to interpret the contract to resolve the claim in order to ascertain whether, for example, the employer could have made a reasonable accommodation to allow the employee to work by transferring the employee to another job. Under the quantum of contract interpretation version of the dependence test such a claim could be preempted.

There is support for the quantum of contract interpretation version of the dependence test in subsequent Supreme Court decisions as well. The clearest endorsement of this test came in Lingle v. Norge Division of Magic Chef, Inc. In Lingle, the Supreme Court upheld an employee’s ability to bring a state law claim that her employer had discharged her in retaliation for filing a workers’ compensation claim. The Court reasoned that the retaliatory discharge claim was “independent” of the collective bargaining agreement “in the sense of ‘independence’ that matters for § 301 preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.” This seemed to settle the law in favor of this version of the dependence test.

70. See White, supra note 21, at 426-34; Brower, supra note 39, at 428-29.

In its brief in Livadas, the AFL-CIO noted and criticized the fact that most lower courts have construed section 301 preemption as reducing to the question “whether resolution of the claim that rests on the public right entails some specified quantum of contract interpretation.” Brief for the AFL-CIO, supra note 44, at nn.4-9 (citing Magerer v. John Sexton & Co., 912 F.2d 525 (1st Cir. 1990); Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988); Pennsylvania Federation of Bhd. of Maintenance of Way Engineers v. National R.R. Passenger Corp., 989 F.2d 112 (3d Cir. 1993); McCormick v. AT&T Technologies, Inc., 934 F.2d 531 (4th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 912 (1992); Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250, 1256 (5th Cir. 1990); Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989); Schlacter-Jones v. General Tel., 936 F.2d 435 (9th Cir. 1991); Strikes v. Chevron USA, Inc., 914 F.2d 1265 (9th Cir. 1990); Utility Workers v. Southern Cal. Edison Co., 852 F.2d 1083, 1086-87 (9th Cir. 1988); Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988); Johnson v. Beatrice Foods Co., 921 F.2d 1015 (10th Cir. 1990)).

One Court of Appeals has taken the position that both versions of the dependence test must be applied. Under its reasoning, a claim is preempted either if it does not embody an independent public law right or if it requires more than minimal contract interpretation. Decoe v. General Motors Corp., 32 F.3d 212, 218 (6th Cir. 1994).

71. See Brief for AFL-CIO, supra note 44 (coining this phrase).

72. See infra note 232 and accompanying text (discussing preemption of disability discrimination claims).


74. Id. at 407. The Court rejected the Court of Appeals’s position that any state claim that requires the “same analysis of the facts” as a claim brought under the contract is dependent on the contract and thus preempted. Id. at 408 (quoting Lingle v. Norge Division of Magic Chef, Inc., 823 F.2d
Such a settlement was short-lived, however. As discussed above, language in some post-\textit{Lingle} cases appears to endorse the public law version of the dependence test.\textsuperscript{75} These later decisions, however, do not unequivocally support the public law version of the test; they also contain language that can be interpreted to endorse the quantum of interpretation version of the test.\textsuperscript{76}

The Court in \textit{Lingle} also left another issue in a confused state—the issue of how much contract interpretation is too much. The \textit{Lingle} Court, for the first time, dropped the word “substantial” from the dependence test, without providing an explanation.\textsuperscript{77} Some commentators have claimed that by doing so the Court intended to broaden the test for preemption.\textsuperscript{78} The word “substantial” popped back up, however, in a footnote in \textit{Lingle},\textsuperscript{79} and in a later opinion.\textsuperscript{80} Thus, there is confusion about whether the dependence on the contract need be substantial in order for the plaintiff’s claim to be preempted.

The \textit{Lingle} Court also indicated that the mere fact that the contract would be consulted in order, for example, to calculate a remedy does not require preemption.\textsuperscript{81} The case would proceed in court, but the Court

\begin{footnotes}
\footnote{1031, 1046 (1987)). Norge properly removed the case to federal court based on diversity jurisdiction. 486 U.S. at 402. Thus, unlike in \textit{Caterpillar}, there was no complete preemption issue.}
\footnote{75. \textit{See supra} notes 45-47 and accompanying text.}
\footnote{76. \textit{See United Steelworkers of Am. v. Rawson}, 495 U.S. 362, 366-67 (1990) (“resolution of a state-law tort claim must be treated as a claim arising under federal labor law when it is substantially dependent on construction of the terms of a collective-bargaining agreement . . . .”); \textit{Livadas v. Bradshaw}, 114 S. Ct. 2068, 2078-79 (1994) (citing favorably to \textit{Lingle}); \textit{Hawaiian Airlines, Inc. v. Norris}, 114 S. Ct. 2239, 2248 (1994) (\textit{Lingle} recognized that “where the resolution of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is preempted.”) (emphasis added); \textit{see also Rawson}, 495 U.S. at 377 (Kennedy, J., dissenting) (stating that the earlier cases “hold that § 301 pre-empts state law causes of action that require interpretation of a collective-bargaining agreement.”).}
\footnote{77. As the Court put it: \textbf{[I]f} the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute. 486 U.S. at 405-06 (emphasis added).}
\footnote{78. \textit{See Katherine Van Wezel Stone}, \textit{The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System}, 59 U. Chi. L. Rev. 575, 604 (1992); \textit{Note, supra} note 43, at 218-19. \textit{But see White, supra} note 21, at 415 (arguing that the \textit{Lingle} and \textit{Caterpillar} decisions led lower courts to narrow the scope of section 301 preemption).}
\footnote{80. \textit{See Rawson}, 495 U.S. at 366-67.}
\footnote{81. 486 U.S. at 413 n.12 (“A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled . . . . Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand.”).}
\end{footnotes}
would use federal law to interpret the relevant provisions of the collective bargaining agreement. As the Court put it:

as a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted.

Thus, the fact that a court must interpret the collective bargaining agreement does not always necessitate preemption. The degree of dependence must first pass some vaguely specified threshold.

C. Conclusion

The Supreme Court’s jurisprudence of section 301 preemption thus has been very confused. Many questions have been left unanswered—most notably, what is the test for preemption? Is the negotiability test still alive? And, if so, is negotiability a necessary precursor to preemption, a sufficient precursor, or a somewhat probative factor?

Even if one reads the Court’s opinions as jettisoning the negotiability test, many questions remain with regard to the dependence test, most notably which version of the dependence test courts should follow. Should courts ask whether the source of the right at issue is rooted in public law rather than private contractual rights? Or should they ask whether more than a certain minimum amount of contract interpretation will be necessitated in order to resolve the case?

This confusion has sparked controversy in the lower courts. The Supreme Court could try to remedy this confusion by adopting one clear test for preemption. This is not a good solution to the problem, however, because, as I will discuss next, section 301 preemption of state individual employment rights claims is both harmful and unnecessary. Rather than selecting from the current 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.

82. Id.
83. Id.
III

THE HARMS CAUSED BY PREEMPTION

A. Interference with State Interests

The question of preemption is a question of competing state and federal interests. Although Congress has the power to preempt state law, because of the cost that preemption exacts from the states, one should not lightly assume that it has exercised this power. Consequently, except where Congress has clearly authorized preemption, in general courts correctly adopt a presumption against preemption. They require some significant interference with a federal interest before they will preempt state law. This reluctance to preempt is particularly appropriate when the state interest in regulating is strong. Thus, the Supreme Court has recognized an exception under one of the other labor law preemption doctrines that can protect state laws that implicate “interests . . . deeply rooted in local feeling and responsibility.”

The Supreme Court has stated that section 301 preemption falls into that narrow category of situations in which no consideration of the state interest is necessary, because this is an area in which “Congress has mandated that federal law should govern.” This is clearly wrong. It is hard to imagine a statute that less clearly evinces a congressional mandate to preempt a specific area of state law; section 301 is, on its face, a mere jurisdiction-granting statute. Consequently, courts should consider both the state and federal interests when deciding how much state law section 301 should preempt. It is my argument that the states have a very strong interest in preserving their laws granting individual employment rights.

1. The State’s Interest in Preserving Non-Negotiable Rights

In Lingle v. Norge Division of Magic Chef, Inc., the Supreme Court rejected the argument that any time an employee could potentially get her claim redressed by an arbitrator, then any state laws providing possible parallel protection should be preempted. Thus, it permitted the employee to...
pursue a claim alleging that the employer violated a non-negotiable state law prohibiting discharges in retaliation for filing workers' compensation claims,\textsuperscript{93} despite the fact that she had already presented a factually similar claim to an arbitrator, alleging that the discharge violated her collective bargaining agreement.\textsuperscript{94}

The state interest in having \textit{Lingle} come out as it did, to protect non-negotiable state rights, was strong. If \textit{Lingle} had gone the other way, important state policies designed to protect workers could be thwarted in the unionized context. In \textit{Lingle}, the arbitrator deciding the contractual claim happened to find that the protection provided by the collective bargaining agreement included the protection against retaliation for filing workers compensation claims. He need not have done so, and if he had not, and if the \textit{Lingle} case had been decided the other way, the state would have been powerless to protect Ms. Lingle from such retaliation.\textsuperscript{95} Yet there is no reason to think that federal labor relations law was intended to restrict the ability of states to give workers basic protections regardless of their union status.\textsuperscript{96} After all, as will be discussed below, any interference with the federal scheme caused by freeing such laws from preemption would be slight.\textsuperscript{97}

Furthermore, states have a strong interest in providing particular remedies to employees who are victims of violations of state law, which a converse decision in \textit{Lingle} would have precluded. A right is only as secure as the remedy which attaches to its violation.\textsuperscript{98} If \textit{Lingle} had been decided the other way, then states would be powerless to ensure that an effective remedy exists for breaches of the state-created duty.\textsuperscript{99}

\textsuperscript{93} Id. at 406-07.
\textsuperscript{94} Id. at 401-02.
\textsuperscript{95} Cf. \textit{Lingle}, 486 U.S. at 413 ("For even if an arbitrator should conclude that the contract does not prohibit a particular discriminatory or retaliatory discharge, that conclusion might or might not be consistent with a proper interpretation of state law.").
\textsuperscript{96} See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-12 (1985) (There is no suggestion that "Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation."); id. at 212 ("Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.").
\textsuperscript{97} See infra notes 130-187, 198-221 and accompanying text.
\textsuperscript{99} Full tort damages are virtually never recoverable in contractual grievance proceedings. See Jane Byeff Korn, \textit{Collective Rights and Individual Remedies: Rebalancing the Balance after Lingle v. Norge Division of Magic Chef, Inc.}, 41 \textit{Hastings L.J.} 1149, 1156-57 (1990). Furthermore, as the \textit{Lingle} case illustrates, a collective bargaining agreement can provide for less than the full measure of ordinary contract damages. See Reply Brief in Support of Petition for a Writ of Certiorari, \textit{Lingle v. Norge Division of Magic Chef, Inc.}, 486 U.S. 399 (1988) (No. 87-259) (explaining that in her tort suit, Ms.
2. The State's Interest in Preserving Negotiable and Waivable Rights

The existence of a strong state interest in maintaining non-negotiable state law rights supports the Supreme Court's decision in *Lingle* that the state tort in that case was not preempted. But I further argue that negotiable and waivable rights should be free from preemption as well. This is a more difficult argument because it can be argued in response that the state's interest is not very strong when it enacts a right that parties can either alter by agreement or even, in some cases, waive entirely.

Let us first consider state-law rights that are negotiable, but not wholly waivable. An example of such a right is the Wisconsin tort at issue in *Allis-Chalmers Corp. v. Lueck*, which required that disability insurance payments be handled in a good faith manner. As noted above, this right is negotiable because parties have a broad right to define the proper methods for handling payment of disability claims. The right is not wholly waivable, however, in that the parties cannot consent to allow the employer to pay disability insurance claims in a bad faith way.

Consequently, although Wisconsin did not assert an interest in defining the exact methods in which disability payments are made, it did express an interest that they be made within a certain range of good faith. There is no reason to accord less weight to a state policy merely because the state defines a range of acceptable conduct within which parties can negotiate, rather than specifying one particular acceptable act. Hence, for the same reasons that *Lingle* was correctly decided, it also makes sense not to preempt negotiable state law rights.

The most difficult set of state-created rights to defend are those that are entirely waivable, which provide mere default rules that the parties can opt out of at will. As an example of such a waivable right, consider a state protection of a right to privacy against incursions by an employer. As a default matter, employees generally possess this right. Consequently, if the employer spies on employees in the locker room while they are changing, it has likely violated state tort law. On the other hand, employees can waive aspects of this right entirely. For example, presumably a court would not find an employer liable for observing a professional stripper undress at the workplace.

In this situation, it is hard to say that the state has a strong interest in making sure that the created right is respected. After all, parties can trade the right away in private transactions. Why then should federal labor law

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Lingle was seeking to recover "reinstatement to her old job, not simply to another job that she was given after the arbitration; back pay at a fully compensatory level, not the special low amount provided by the collective bargaining agreement for those reinstated in arbitration; and punitive damages.".


101. See supra note 29 and accompanying text.

treat it with any respect? Why not find preemption if there is any detriment at all to any federal policy?  

However, even in these situations the state is expressing an interest in who should possess the negotiable right in the first instance—the employee or the employer. Assigning the right to one party as an initial matter will likely have consequences on the ultimate distribution of rights between the parties by affecting the parties’ relative bargaining power. One party ends up with one more good in its basket that it can trade, effectively making that party “wealthier.” The question is, then, whether states should be given the right to affect bargaining power in this way or whether such attempts to influence bargaining power are preempted by federal law.

It is true that states generally are not permitted to enact laws designed to affect the relative bargaining power of unions and employers; that is the province of federal law. On the other hand, states are freely permitted to enact laws designed to affect the bargaining power of individual non-unionized employees vis-a-vis their employers. The question presented here falls between these two clear legal poles; the question is whether states have the

103. Cf. In the Matter of Amoco Petroleum Additives Co., 964 F.2d 706 (7th Cir. 1992) (holding a claim that employer invaded employee’s privacy by installing video camera in the ceiling above the entrance hall to women’s locker room preempted under section 301).

104. For a discussion of the distributional effects of legally assigning negotiable rights to unions, as opposed to management, in the context of a discussion of rights assigned by the NLRA, see Dennis O. Lynch, Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again, 44 U. MIAMI L. REV. 237, 305-12 (1989). Professor Lynch demonstrates that assigning negotiable legal rights to unions can make unions effectively wealthier and thus able to purchase more of the ultimate package of contractual rights that they desire. Id.

Similarly, Professor Douglas Leslie explains that even in a world without transaction costs, initial assignment of legal rights will have a distributional effect, making the party possessing the right wealthier. See Douglas L. Leslie, Multiemployer Bargaining Rules, 75 VA. L. REV. 241, 251-52 (1989). The only exception to this occurs with respect to “contract gap filling rule[s],” id. at 252, which create legal rights that can have no existence absent a contractual relationship. Id. at 253. In a world without transaction costs, the choice of contract gap filler should have no distributional effect. Id. at 252-253. Many of the negotiable individual employment rights that have become the subject of claims of section 301 preemption fall into Professor Leslie’s first category. For example, rights to privacy, rights against defamation, and rights against the intentional infliction of emotional distress can all exist absent a contractual relationship. As for contractual gap fillers, Professor Leslie admits that the lack of distributional effect is linked to the assumption that there are no transaction costs. Id. at 250. He also recognizes that there are likely to be transaction costs that pertain in a collective bargaining relationship. Id. at 254-58. Given transaction costs, the legislature’s or court’s choice of contract gap-filler can have distributional effects. But see Stewart J. Schwab, Collective Bargaining and the Coase Theorem, 72 CORNELL L. REV. 245, 261-66 (1987) (disputing the idea that there are significant transaction costs in collective bargaining and discussing, but reaching no firm conclusion, about whether there is any long-run distributional effect that flows from altering the initial assignment of negotiable rights between unions and management).

power to enact laws designed to affect the bargaining power of individual employees, even if these employees are unionized. After all, the individual bargaining power of such unionized employees will ultimately be pooled and asserted as collective bargaining power.

I believe that states do have this right. After all, the initial negotiable state right must be assigned to somebody—either employees or employers. Either the employer may not look at the naked employee without his or her consent, or the employer may do so unless the employee specifically negotiates for a prohibition of such behavior. If one believes that such laws should be preempted, then one would conclude that if the state creates the right to privacy and assigns it to employees, it is preempted if the employees are covered by a collective bargaining agreement. On the other hand, if the state assigns a waivable right to invade privacy to the employer, that would not be preempted; since employers would not need to attempt to enforce that right through individual litigation, the preemption issue would never arise. Thus, finding preemption of the state right to privacy would not be a means of enforcing state neutrality; it would be a means of enforcing a default rule that benefits employers. In enacting the LMRA, Congress clearly did not intend to ensure that state assignment of negotiable individual employment rights would always favor employers.

Thus, the state has a legitimate interest in preservation of all state-created individual employment rights. It does not matter whether the right is non-negotiable, negotiable, or waivable.

B. Concerns about Fairness to Individual Workers

Besides trampling on legitimate state interests, preempting state individual employment rights claims brought by employees covered by collective bargaining agreements is unfair to those workers who opt to unionize. Through the act of unionizing and reaching a collective agreement, acts which are supposed to benefit them, the employees perversely are deemed to have cast aside rights and remedies that they otherwise would have had.106

In opposition to this, one might argue that, if unionized employees want the types of rights and remedies that the state provides, they can bargain for them. After all, unionized employees are generally in a pretty good position to bargain with their employers. But this argument is not persuasive. Why should unionized employees be forced to bargain for, perhaps thereby giving up other desired benefits, rights that their non-unionized

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106. Cf. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.").
counterparts get automatically? Why should they start at a worse baseline for bargaining?

One might also argue that these employees will not need the protections of state law, since they will often have parallel protections under the collective bargaining agreement. Thus, no great unfairness is done to them by preempting state law.\textsuperscript{107} But this argument does not justify section 301 preemption. First, under the current doctrine of section 301 preemption, state laws can be preempted even absent parallel contractual protections and, certainly, without parallel remedies.\textsuperscript{108} Indeed, it is rare that a collective bargaining agreement provides remedies comparable to those secured by state law.\textsuperscript{109} Second, even if a collective bargaining agreement does provide parallel protections, the employee may not always be able to get redress because access to arbitration under such agreements is controlled by the union. If the union decides not to proceed with the grievance, the employee has no recourse unless she can establish that the union's refusal was motivated by "arbitrary, discriminatory, or bad faith" reasons,\textsuperscript{110} a very difficult thing to do. Finally, absent demonstration of significant interference with the federal scheme, it should be up to the states to decide whether unionized employees need the rights and remedies that the states are providing. If a state has reason to think that employees that are covered by a collective bargaining agreement are not in need of particular state-law protections, they can refuse to extend the state law rights to such employees.\textsuperscript{111}

Preempting state individual employment rights laws is thus harmful both to states and to individual unionized employees. Courts should not infer that Congress intended to cause this harm unless permitting such claims to survive would conflict seriously with federal policies. I will now argue that there is no such conflict.

\section*{IV

\textbf{Federal Policies Do Not Necessitate Preemption}}

As discussed above, the Supreme Court has set forth two federal policies to justify applying section 301 preemption to individual employment rights claims brought under state law: (1) the need to have a uniform body of law governing the interpretation of collective bargaining agreements; and (2) the need to preserve the central role of arbitrators as the primary inter-

\textsuperscript{107} See White, supra note 21, at 393.

\textsuperscript{108} See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1179-80 (7th Cir. 1993).

\textsuperscript{109} See Kom, supra note 99, at 1156-57.

\textsuperscript{110} Vaca v. Sipes, 386 U.S. 171, 190 (1967).

\textsuperscript{111} On the other hand, if the state arbitrarily denies unionized employees rights granted to their non-union counterpart, the state law would be preempted as inconsistent with the NLRA, 29 U.S.C.A. §§ 141-187 (West 1978), which guarantees employees the right to unionize. See Livadas v. Bradshaw, 114 S. Ct. 2068, 2074 (1994).
preters of these agreements. The Court has done little in the section 301 cases, however, to explore how these purposes would be threatened absent preemption. I argue that neither purpose would be undermined if employees covered by collective bargaining agreements are permitted to bring individual employment rights claims.

A. The Need to Preserve a Uniform Law

Uniformity of law is essential, according to the Supreme Court, in order to permit parties to collective bargaining agreements to predict how their agreements subsequently will be interpreted. The Court cautioned that the lack of such predictability would both prolong disputes and make it difficult for parties to agree on contractual language in the future. Consequently, such lack of predictability is threatening to labor peace.

Uniformity of governing law is important to labor peace. Although legal uniformity does not guarantee uniformity of interpretation of particular contractual provisions, because much interpretation involves a factual assessment about the intentions of the parties, a lack of uniformity will certainly lead to different interpretations in similar cases.

1. The Principles of Federal Common Law

Over the years, the Supreme Court has articulated only a handful of principles constituting the uniform federal common law of labor contracts. The first group of principles was created by the Supreme Court out of a desire to preserve labor peace by ensuring the effectiveness of arbitration as a means of settling disputes without resort to economic warfare. These principles include: (1) that courts should enforce arbitration agreements; (2) that, unless the contract specifically provides otherwise, agreements should be construed to contain implicit no-strike clauses that are co-extensive with the parties' agreement to arbitrate; (3) that arbitration of a covered claim should be ordered even if a court deems the claim to be frivolous; (4) that courts should review arbitration awards only in a lim-
ited manner;\(^{119}\) (5) that ambiguous arbitration clauses should be read to require arbitration of arguably covered issues;\(^{120}\) (6) that the issue of whether a particular type of claim is arbitrable is generally an issue for the court, rather than the arbitrator, whereas the issue of whether a party has met all the procedural prerequisites to arbitration is generally a question for the arbitrator to decide;\(^{121}\) (7) that the duty to arbitrate can in some cases survive a change in corporate structure;\(^{122}\) and (8) that "termination of a collective bargaining agreement [does not] automatically extinguish[ ] a party's duty to arbitrate grievances arising under the contract."\(^{123}\)

In addition, the Supreme Court has adopted a couple of common law principles that require that certain types of contractual provisions be clearly stated if they are to be enforceable. It has held that any purported waiver by the union of a federal statutory right must be "clear and unmistakable."\(^{124}\) And it has held that, in cases in which an employee asserts that the union has obligated itself to a specific duty to employees through the collective bargaining agreement, the employee "must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employee."\(^{125}\) These principles are designed to protect unions from inadvertently losing rights or gaining potentially costly obligations through the collective bargaining agreement.


\(^{120}\) United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581, 582-83 (1960).


\(^{122}\) \textit{Id.} at 549-51. Not all successor employers are required to assume duties created by the collective bargaining agreement, including the duty to arbitrate. \textit{See} Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees & Bartenders Int'l Union, 417 U.S. 249, 262-64 (1974).

\(^{123}\) Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 251 (1977). The Court later held, however, that grievances that arise after the expiration of the collective bargaining agreement, and not under the agreement, are not arbitrable. \textit{See} Litton Fin. Printing Div., Inc. v. NLRB, 501 U.S. 190, 205-08 (1991).

\(^{124}\) Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). In \textit{Metropolitan Edison}, the Supreme Court reviewed a decision by the National Labor Relations Board (NLRB) confronting the issue of whether a union had waived an employee's right under the NLRA. \textit{Id.} In \textit{Lingle v. Norge Division of Magic Chef, Inc.}, 486 U.S. 399 (1988), the Court stated that the same clear statement principle might apply when deciding whether a union had waived a state statutory right. \textit{Id.} at 410 n.9. Specifically, the Court noted that the Illinois law did not permit waiver of the state right against retaliatory discharge for filing workers compensation claims. \textit{Id.} The Court then stated that it did not need to decide whether federal labor law required that the right be waivable by unions, even when state law did not provide for waiver, because there was no "clear and unmistakable" evidence of waiver. \textit{Id.} In situations, in contrast, in which the state right is waivable pursuant to state law, I would argue that state law should govern the issue of whether waiver occurred. \textit{See infra} note 136.

\(^{125}\) United Steelworkers of Am. v. Rawson, 495 U.S. 362, 374 (1990) (finding collective agreement did not contain a right enforceable by employees to have union perform a non-negligent safety inspection).
Finally, there are a couple of federal common law principles designed to protect individual employees from damage awards relating to their labor activity. First, individual union officers and members are not personally liable for damages caused by a union-authorized strike in violation of a contractual no-strike clause. Second, individual strikers are not personally liable for damages resulting from a wildcat strike in violation of a collective bargaining agreement.

If states were permitted to apply their own contract law to determine the meaning and enforceability of collective bargaining agreements, there is a clear risk that the state laws would differ from the federal law, to the detriment of Congress's concern with preserving predictability and, thereby, labor peace. States could adopt legal principles that directly conflicted with the federal principles just enumerated. For example, at the time that the Court decided *Textile Workers Union of America v. Lincoln Mills*, which authorized enforcement of arbitration clauses pursuant to federal common law, many states' contract laws did not provide for the enforceability of arbitration agreements. Since non-enforcement of arbitration clauses can lead to labor disputes, such use of state law would threaten one cornerstone of federal labor policy.

2. *A Narrower Way to Ensure Predictability*

The observation that state law can threaten federal labor policy should not lead to the conclusion that courts must preempt state individual employment rights laws in some situations. Uniform legal principles can largely be preserved without preemption. If resolution of a claim of a state-created individual employment right requires a court to interpret the agreement, then that court can use federal common law interstitially to govern its contract interpretation.

Indeed, the Supreme Court in *Caterpillar Inc. v. Williams* seemed to authorize courts to resolve contract interpretation issues that arise in the course of adjudicating state law claims in some circumstances, although it


129. See Livadas v. Bradshaw, 114 S. Ct. 2068, 2077 (1994) (noting that the development of a federal common law of labor contracts was begun "in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution.").
did not indicate whether courts should apply state or federal law when doing so. In *Caterpillar*, the Court permitted the state court on remand to consider the employer’s defense that the employees had waived their individual contractual rights through the collective bargaining agreement, even though that defense would certainly require interpretation of the collective agreement.\(^{131}\) It is hard to understand why state courts should be permitted to interpret the contract when interpretation is required by a defense, but not when it is required by the case-in-chief.

Even more strikingly, in *Lingle v. Norge Division of Magic Chef, Inc.*, the Court explicitly authorized courts interpreting state law claims to interpret contractual language using federal common law, so long as the language is only tangentially involved in the dispute.\(^{132}\) As the Court later put it in another case, “[section] 301 does not disable state courts from interpreting the terms of collective-bargaining agreements in resolving non-preempted claims.”\(^{133}\) If courts can be trusted to interpret the tangential language in a way that does not threaten predictability, why can they not also interpret the language that is more central to a particular dispute? After all, language tangential in one case may be central in another.

Moreover, most of the currently recognized principles of federal common law articulated by the Court\(^{134}\) would be irrelevant in determining how to interpret particular contract language in state law cases. In most cases, the interpretation issue is simply a factual issue about how the parties intended that particular words be construed given the language they used and their bargaining history. Furthermore, the bulk of these federal common law principles relate to the enforceability of clauses that authorize the arbitration of grievances involving the interpretation of the contract. The enforceability of such contractual grievance clauses is simply not an issue when an employee sues under a state tort law or alleges that the employer breached a contract that was not the collective bargaining agreement. Similarly, the common law principles that insulate individuals from damage liability for engaging in strikes that violate a collective bargaining agreement would also be irrelevant.

The only currently articulated principles of federal common law that are likely to be called upon with any regularity in determining the meaning

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131. Id. at 397-99; see also Adams, supra note 43, at 130. For a fuller discussion of *Caterpillar*, see note 48-68 and accompanying text.
132. As the Court explained in *Lingle*:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted.

133. Livadas, 114 S. Ct. at 2078 n.17.
134. See supra notes 115-127 and accompanying text (setting forth the recognized principles of the federal common law of labor contracts).
of a collective bargaining agreement are the two clear statement principles discussed above.\footnote{135} As noted above, the first clear statement principle requires that any alleged waiver of a federal statutory right be "clear and unmistakable." This principle will not be of much consequence in state law cases, however, unless the principle is expanded such that federal common law principles are used to determine whether state law rights have been waived as well. Yet strong arguments can be made in favor of having state law, rather than federal law, determine the waivability of state-law rights.\footnote{136}

Finally, there likely will be few cases that invoke the second clear statement principle, which requires that any contractual duty assumed by the union toward individual employees be specifically stated in the collective agreement. There are few state-law suits brought by employees against their unions alleging breach of contractually-created duties owed by the union to the employees. Furthermore, even if courts wrongfully failed to apply this principle interstitially in state law cases, this probably would not undermine predictability and labor peace, the concerns that animate the Supreme Court's section 301 decisions. Unpredictability in this type of case would not prolong a dispute between labor and management, which is the concern that led to the development of section 301 preemption; instead it would merely prolong a dispute between an individual employee and her union.\footnote{137} Thus, since state courts will not be called upon frequently to apply the principles of federal common law as currently recognized, they would have little chance to make errors that could be destabilizing to labor peace.

3. Responding to Potential Counterarguments

a. Differences Among Arbitrators, Judges, and Juries

In opposition to permitting state and federal judges to interpret collective bargaining agreements using principles of federal common law, one might argue that judges as a group will interpret language differently from

\footnote{135} See \textit{supra} notes 124-125 and accompanying text.

\footnote{136} Professor Michael Harper makes a strong argument that the question whether a given state law right is waivable by a union should be a question of state law. Harper, \textit{supra} note 28, at 711-12. He notes that states have a strong interest in being able to set the standard for determining whether a state-created right has been waived. \textit{id.} at 711. Furthermore, he argues that using state law in this way will not interfere with the collective bargaining process. Employers will not be deterred from negotiating, since learning about the state law and negotiating a waiver could only leave the employer better off. \textit{id.} at 712. Furthermore, unions will not be concerned that states will set traps for them because "state law can be expected to require a clearer indication of the union's willingness to compromise rights secured by that same state law." \textit{id.}

\footnote{137} The only exception would be if management somehow takes the individual employee's side against the union. Furthermore, it is possible that such unpredictability could make it more difficult for labor and management to draft future collective bargaining agreements, if unions were fearful that language in the agreement could open them up to unexpected liability \textit{vis-a-vis} represented employees.
arbitrators. Thus, even if the same governing rules of law apply, there will be different results if courts are permitted to do the interpretation.

Strict uniformity of interpretation, giving the parties an absolute ability to predict how their agreement will be interpreted, is not needed, however. After all, current law does not require such uniform interpretation of collective bargaining agreements. Under current law, parties will often be uncertain how the language of their collective bargaining agreement will be interpreted should a case go all the way to arbitration. Only a small minority of arbitration decisions are published,\(^\text{138}\) thus, parties will not often be able to take advantage of pre-interpreted language borrowed for other parties’ agreements. Furthermore, arbitrators will tend to construe each individual contract based on individual facts and background.\(^\text{139}\) Finally, it is possible for the same contract language to be construed differently in a subsequent dispute heard by a different arbitrator.\(^\text{140}\)

Significantly, the system seems to be working despite this lack of perfect uniformity of interpretation, at least to the extent that neither management nor labor is pushing for a system that would create strict uniformity of interpretation, nor are major labor disputes relating to contract interpretation persistently crippling our economy. Hence, strict uniformity in interpretation of contracts and, concomitantly, an absolute ability to predict the outcome of disputes about contract meaning, does not seem to be crucial to a stable system of labor relations.

Nonetheless, one might argue that interpretations given by judges as a group will be outside the range given by arbitrators. If this were true, the possibility that a judge rather than an arbitrator would interpret the language would make it even more difficult than it is currently for parties to predict how the language will be interpreted. There is, however, reason to dispute this argument.

A first answer is to point out that there are many situations in which judges interpret collective bargaining agreements even under the current law of section 301 preemption. Courts may interpret collective bargaining agreements in the course of resolving federal individual employment rights


\(^{139}\) See Lynch, supra note 104, at 284-85.

\(^{140}\) See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 699 ("[A] previous arbitration decision normally would not bind an arbitrator later construing the same collective-bargaining agreement."); Adams, supra note 43, at 129 ("[T]he arbitration process does not support the goal of developing a uniform body of federal law because arbitrators vary in their contract interpretations and only loosely follow precedent."); Ahmad R. Karim, Why Arbitrators Sustain Discharge Penalties, 45 LABOR L.J. 374, 375 (1994) ("Some authors have argued that arbitrators’ decisions in discharge cases are inconsistent and earlier research has shown substantial variety in considerations employed by arbitrators in their decisions."); see also FRANK ELKOURI & EDDA ASPER ELKOURI, HOW ARBITRATION WORKS 119 (4th ed. 1985) (noting that “a high percentage” of arbitrations are conducted by an individual arbitrator on an ad hoc basis).
Similarly, individual employees may get a judicial determination of their rights under a collective bargaining agreement, even if the agreement provides for arbitration of such claims, if the union breached its duty of fair representation by failing to process the claim, or if the employee


Some lawyers argue that the Alexander line of cases is no longer good law in light of the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). In Gilmer, the Court held that the fact that an individual unrepresented employee had signed an agreement to arbitrate all claims relating to his employment precluded him from bringing a suit in court under the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-633(a) (West 1985). 500 U.S. at 35. His discrimination claims had to be heard by an arbitrator. Id.

Rather than overruling Alexander and its progeny, however, the Supreme Court in Gilmer specifically distinguished these cases on three grounds. 500 U.S. 33-35. First, in Alexander and its progeny, the arbitration clauses had only required arbitration of contractual rights, not statutory rights. Id. at 35. Second, there can be a "disparity in interests between a union and an employee," making it inappropriate to permit the union to require arbitration of statutory claims on behalf of the employee. Id. at 34-35. Finally, the earlier cases were not decided under the Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1-16 (West 1979), which evinces a strongly pro-arbitration policy for covered claims. Id. at 35.

Consequently, most courts that have addressed the issue have correctly held that Gilmer did not overrule Alexander and its progeny. See, e.g., Tran v. Tran, 54 F.3d 115, 117-18 (2d Cir. 1995); Bates v. Long Island R.R., 997 F.2d 1028, 1034-35 (2d Cir. 1993); Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 826 n. 26 (3d Cir. 1991) (en banc); Martin Marietta Corp. v. Maryland Comm'n on Human Relations, 38 F.3d 1392, 1402 (4th Cir. 1994); But see Austin v. Owens-Brockway Glass Container, Inc., 844 F. Supp. 1103, 1106 (W.D. Vir. 1994) (relying on Gilmer, without discussing Alexander, and holding that an employee governed by a collective bargaining agreement must bring his Title VII and Americans with Disabilities Act claims to arbitration).

142. Vaca v. Sipes, 386 U.S. 171, 186 (1967). The duty of fair representation, or "DFR," prohibits unions from taking actions that disadvantage particular employees, either within the context of negotiating a collective bargaining agreement or of processing grievances, if the union is motivated by "arbitrary, discriminatory, or bad faith" reasons. Id. at 190. If a represented employee believes that her union has violated this duty, she can either bring an unfair labor practice charge before the NLRB or bring suit in court. Id. at 186-87. When suing in court based on a union's failure to bring a grievance, employees generally bring what are termed hybrid 301/DFR suits against both the union and the employer. In such cases, the employee claims, first, that the union violated the duty of fair representation by failing to process the grievance, and, second, that the grievance was meritorious because the employer violated the underlying collective bargaining agreement. If the employee is successful in both parts of her suit, she can recover from the union for any harm that results from the breach of the DFR and from the employer for the underlying breach of contract. Id. at 187-88. The merits of the suit against the union, including the meaning of the contract, can be determined either by a judge or a jury. Chauffeurs Local 391 v. Terry, 494 U.S. 558, 573 (1990).
can establish either that resort to the grievance process would be futile\textsuperscript{143} or that the employer's actions amount to a repudiation of the contract.\textsuperscript{144}

Furthermore, courts can also be called upon to interpret collective bargaining agreements in the context of reviewing certain decisions by the National Labor Relations Board (NLRB). For example, in deciding whether an employer has violated the National Labor Relations Act (NLRA)\textsuperscript{145} by disciplining an employee for engaging in statutorily-protected actions, the NLRB sometimes must decide whether the union waived the employee's otherwise applicable statutory rights through the collective bargaining agreement.\textsuperscript{146} Similarly, under the Supreme Court's approach to determining what is concerted activity protected by the NLRA, the NLRB can be required to determine whether employees have a contractual right to engage in particular behavior.\textsuperscript{147} Decisions on these issues, like all NLRB decisions, can be subject to judicial review.\textsuperscript{148} Finally, courts have also sometimes made at least a preliminary assessment of the meaning of a collective bargaining agreement in the context of deciding whether to issue preliminary injunctions pending arbitration.\textsuperscript{149}

These court decisions do not seem to be so far away from arbitral interpretations as to threaten predictability in a serious way. Collective bargaining agreements continue to be negotiated and disputes continue to be resolved despite this judicial role.

But this is only a partial answer. Doing away with section 301 preemption of state individual employment rights claims would greatly expand the universe of cases in which judges are called upon to interpret agreements. Even if the system can tolerate some unpredictability in the handful of cases in which courts currently interpret collective bargaining agreements, that does not mean it could withstand the onslaught of judicial interpretation that would follow the change in law that this Article advocates.

There is merit to the contention that judges and arbitrators are likely to interpret contracts somewhat differently. Much of the federal common law of labor contracts is premised on the notion that arbitrators will interpret contracts better than (and, thus, differently from) judges. As the Supreme Court explained at length in the famed Steelworkers Trilogy, arbitrators generally have more of an appreciation of the realities of the workplace and

\textsuperscript{144} Vaca, 386 U.S. at 185.
\textsuperscript{147} City Disposal, 465 U.S. at 837 (holding that activity by a single employee is concerted if it invokes a right rooted in the collective bargaining agreement); see Lynch, supra note 104, at 320-27 (discussing Metropolitan Edison and City Disposal).
\textsuperscript{149} See Lynch, supra note 104, at 280-81 & n.235 (discussing judicial standards for issuing preliminary injunctions pending arbitration in labor cases).
thus more of an understanding of the implicit law of the shop.\textsuperscript{150} Consequently, their interpretations of the contract are more likely to reflect the intentions of the parties and are more likely to embody workable solutions to the problems presented by workplace disputes.\textsuperscript{151}

There are also practical differences between arbitrators and judges that suggest that, on the whole, there will be differences between the interpretations reached by the two groups. Since many labor arbitrators are not lawyers,\textsuperscript{152} they may have a less "legalistic" and more practical approach to contract interpretation. Furthermore, since arbitrators are dependent for their livelihood on being hired by the parties to industrial disputes, they have an incentive to adopt compromise solutions that will not alienate either union or management.\textsuperscript{153} Judges face no such constraints and thus are more likely to adopt all or nothing solutions.

These arguments serve as powerful reasons for retaining the current federal common law principles favoring the arbitration of claims for breach of the collective bargaining agreement. It is much more difficult, however, to answer the question whether the differences between the way that arbitrators and courts interpret contracts are so much greater than the differences among arbitrators so as to constitute a serious threat to predictability that would justify section 301 preemption.

My best guess is that the differences between the way judges and arbitrators interpret contracts are not so dramatic as to endanger predictability if judges are permitted to interpret labor contracts in the context of resolving state law employment suits. Remember, the Supreme Court has endorsed the need for predictability in the interpretation of collective agreements in order to avoid the dual problems of creating stumbling blocks to agreements and exacerbating differences that arise under agreements. Yet, the differences between judges and arbitrators are subtle enough that a lack of

\textsuperscript{150} United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) ("The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgement to bring to bear considerations which are not expressed in the contract as criteria for judgment."); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 & n.2 (1960).

\textsuperscript{151} See Charles B. Craver, Labor Arbitration as a Continuation of the Collective Bargaining Process, 66 CHI.-KENT L. REV. 571, 576 & n.28 (1990)(discussing commentators who have made this argument). Professor Craver notes that, although not all arbitrators necessarily have such expertise, through an arbitration system parties are able to select experts if that is their desire. \textit{Id.} at 577. See also Harry Shulman, Reason, Contract, and Law in Labor Relations, 68 HARV. L. REV. 999, 1007-09 (1955).

\textsuperscript{152} See McVozl & Goggin, supra note 138, at 38.

\textsuperscript{153} See Lynch, supra note 104, at 329 ("An arbitrator must render a decision that is acceptable to the parties within the parameters of their expectations. If an arbitrator reasons from values external to the private regime in interpreting the contract, one party or the other may strike the arbitrator's name from future lists . . . .")
knowledge about who the ultimate interpreter will be would not likely be a factor complicating the negotiation or drafting of the agreement.154

Furthermore, it is improbable that the potential that a judge rather than an arbitrator might decide the claim would prolong labor disputes because of uncertainty as to how the dispute would be resolved in different fora.155 It seems unlikely that there would be cases in which the resolution of an issue of contract interpretation would be clear in the arbitral forum and yet unclear in the judicial forum.

Furthermore, the differences that do exist between judges and arbitrators can be minimized if judges take seriously their responsibility to interpret the collective bargaining agreement in the same manner as an arbitrator. Just as arbitrators do currently, judges interpreting collective bargaining agreements can and should admit evidence about the parties' practices under the agreement (the so-called "law of the shop") in order to ascertain the meaning of the agreement. Judges interpreting such agreements should be as free as arbitrators to go beyond the four corners of the agreement in ascertaining the parties' obligations.156 Consequently, it is likely that there will be little increase in unpredictability of interpretation of collective agreements if judges, using the principles of the federal common law, interpret collective bargaining agreements within the course of resolving state individual employment actions.

State law may also, in some cases, authorize jury interpretation of the contract in the context of resolving the state law claim.157 Jury involvement

154. On the other hand, if it were it uncertain what legal principles would guide the interpretation of the agreement, that could well make negotiating and drafting collective agreements much more difficult. For example, a union would be hard pressed to figure out whether to agree to a no-strike clause co-extensive with an arbitration clause, if it could not know in advance whether the arbitration clause would be enforceable if management refused to obey it. Thus, Lucas Flour itself was clearly correctly decided to the extent that it held that interpretation of collective bargaining agreements should always be governed by principles of federal common law. See supra notes 8-10 and accompanying text (discussing Lucas Flour).

155. Judicial resolution would prolong the dispute in the sense that judicial resolution simply takes longer than arbitral resolution. This is another reason why the federal common law of contracts properly encourages arbitration. But this point has nothing to do with the purpose behind section 301 preemption of allowing the parties to predict how their disputes about contract language will be resolved.

156. See Archibald Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-1500 (1959) (explaining why reference to the law of the shop is necessary in interpreting labor agreements).

will not necessarily cause a great increase in unpredictability of interpretation; after all, juries can in some cases interpret collective bargaining agreements under current law.\textsuperscript{158} But to the extent that one is concerned that juries will act as loose cannons in these cases\textsuperscript{159} and threaten the predictability of interpretation, the federal common law of contracts can be revised to require judicial interpretation of collective bargaining agreements whenever constitutionally permissible. This measure is clearly much less drastic than preempting some state law suits entirely.

In most cases, allowing the judge, rather than the jury, to decide the meaning of the collective bargaining agreement would not conflict with the Seventh Amendment's preservation of the right to jury trials.\textsuperscript{160} Unless the judge determines that the contract language is vague or ambiguous, the judge rather than the jury interprets it under traditional common law principles.\textsuperscript{161} Furthermore, most state individual employment cases would be heard in state court where the Seventh Amendment right to a jury trial is inapplicable.\textsuperscript{162}

Moreover, even if this analysis is wrong and it turns out that there are important differences between the ways that arbitrators and judges or juries interpret contracts that would threaten predictability of interpretation, there is a solution less drastic than preemption. The courts could be required as a matter of federal common law to refer these interpretive issues to arbitrators and then defer to the arbitrator's judgement about what the contract means, much as the NLRB defers to arbitral judgments about the meaning of collective bargaining agreements when such issues arise in the course of adjudicating unfair labor practice claims.\textsuperscript{163}


\textsuperscript{159} See Drummonds, supra note 73, at 589.

\textsuperscript{160} U.S. Const. amend. VII.

\textsuperscript{161} See Arthur L. Corbin, 3 Corbin on Contracts § 554, at 266-68 (supp. 1993) (discussing the distinction that courts draw between contract construction, which is the judge's job, and contract interpretation, which is the jury's).


By definition, these suits raise state law causes of action; hence, they could not be brought in federal court on the basis of federal question jurisdiction. See 28 U.S.C.A. § 1331 (West 1993) (federal question jurisdiction statute). And, although diversity of citizenship between employees and their employers occurs, it is not the norm. See 28 U.S.C.A. § 1332 (West 1993) (diversity jurisdiction statute).

\textsuperscript{163} See Hammontree v. NLRB, 925 F.2d 1486, 1490-1500 (D.C. Cir. 1991) (en banc) (describing and upholding the NLRB's deferral policy); Olin Corp., 268 N.L.R.B. 573 (1984); United Technologies Corp., 268 N.L.R.B. 557 (1984); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Spielberg Mfg., 112
Since I do not believe that allowing judges or juries to interpret collective bargaining agreements would pose a serious threat to predictability of interpretation, I do not view such deferral as necessary. Moreover, there are costs to creating such a deferral system. Referring these issues to arbitration could be a cumbersome process. There would likely be disputes among the parties about where the issues of contract interpretation end and the factual issues necessary to the disposition of the state claim, which the court should resolve, begin. Also, difficult issues would arise if, in a given case, a union refused to pursue arbitration of the claim or pursued the claim in a less than vigorous manner, since the union, rather than the individual employee, controls the access to arbitration under collective bargaining agreements. On the other hand, at least such deferral would provide a method of preserving the uniformity of the federal common law of labor contracts while exacting less of a cost on states and on employees than preemption.

Of course there will be less predictability about the outcome of some labor disputes if state employment laws are not preempted. For example, if an employee is fired, the employer legitimately may worry that even if it prevails in an arbitration, nonetheless that will not end the matter. The employee may challenge the discharge under an appropriate state or federal law relating to employment.

Unpredictability concerning how a given dispute ultimately will be resolved, however, is different from unpredictability concerning how a collective agreement will be interpreted. So long as employees have rights against discharge other than the rights delineated in the collective bargaining agreement, the employer can face prolonged disputes about whether the


Some commentators endorse this approach of deferring to arbitral judgments on issues of contract interpretation that arise in the course of adjudicating state individual employment rights claims. See Drummonds, supra note 73, at 581-82, 594-95; Robert E. Williams & Thomas R. Bagby, Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court’s Decision on Wrongful Discharge Suits and Other State Court Employment Litigation 51-54 (1986). The AFL-CIO has also suggested this approach as a possible solution to the section 301 preemption problem. See Brief for the AFL-CIO, supra note 44; cf. Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1179 (7th Cir. 1993) (Judge Posner suggests that a form of deferral could be an appropriate resolution to the problem of section 301 preemption, although it is not the approach that the Supreme Court endorsed). Such arbitral deferral would not run afoul of the Seventh Amendment in cases in which the contract would otherwise be interpreted by a jury, because the employer waived any right to a jury trial over issues involving interpretation of the contract by inserting an arbitration clause, as did the union acting on behalf of the individual employees.

164. For a criticism of the NLRB’s policy of deferring to arbitrators on matters involving contract interpretation, see generally Lynch, supra note 104. See also Craver, supra note 151, at 612-16 (opposing NLRB policy of referring for an arbitral hearing cases involving individual rights claims); id. at 620-24 (criticizing the NLRB’s post-arbitration deferral policy in individual rights cases as too lax).

165. See Craver, supra note 151, at 613-16 (noting possible conflicts of interest between individuals and unions in the context of grievance processing and arguing that this is a reason that the NLRB should not defer to arbitration in cases involving individual rights).
discharge was appropriate. Yet, it has been long established that even unionized employees can have rights external to the agreement. To hold otherwise would place too high a price on unionization. As the Supreme Court implicitly recognized in *Lingle v. Norge Division of Magic Chef, Inc.*, holding that state law retaliatory discharge claims are not preempted under section 301 merely because the same complaint could be remedied through the arbitration process, section 301 preemption is not properly understood as a method of ensuring that all workplace disputes in unionized workplaces will be resolved in the most expeditious manner possible.

### b. The Problems Posed by Conditional Rights

A second counterargument against my position can be gleaned from an argument voiced by Professor Michael Harper. He argues that predictability can be threatened even if a court uses federal common law to interpret the contract, if the state law at issue creates either extra substantive rights or extra remedies that are conditioned on the existence of particular contractual provisions. If state laws operate in this manner, Professor Harper claims that it would complicate collective bargaining in two ways. First, the parties to the collective agreement may think that they have agreed to some specified limited substantive rights only to find that more rights have been added by state law. Similarly, they may think that they have exposed themselves to limited contract-based remedies only to find that they are suddenly exposed to broad tort damages. Negotiation of collective agreements would become more difficult because the parties would worry that they may run into a costly trap set by state law. This could add a general air of uncertainty to contract negotiation, making em-

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167. Cf *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.").


170. *Id.* at 726-31. The right at issue in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), provides one example of a conditional right. Pursuant to that right, if an employer provides employees with disability insurance benefits, it is required to administer those benefits in a good faith manner. See Harper, supra note 28, at 723 (discussing the conditional nature of the right at issue in *Lueck*). Another example is the right at stake in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), which required that employers who provide health insurance coverage for hospital and surgical expenses also must provide some specified mental health benefits. See Harper, supra note 28, at 724-31 (discussing the conditional nature of the right at issue in *Metropolitan Life*).


172. *Id.*
ployers more reluctant to agree to any contract at all and hence more resistant to unionization.

Second, employers may become less likely to grant certain benefits that the union wants if state law imposes extra costs on granting those benefits. For example, harkening back to the facts of *Allis-Chalmers Corp. v. Lueck*, an employer may be more reluctant to provide disability insurance if it knows that in so doing it is also providing employees with a right to sue for tort damages in state court if the employer handles disability claims in bad faith. Professor Harper thus argues that all state laws that condition benefits on particular contractual provisions should be preempted.

This preemption scheme, however, leads to results that few commentators or courts would favor. Even Professor Harper believes that state anti-discrimination laws should not be preempted by section 301. Indeed, most commentators and the majority of courts deciding section 301 issues conclude that anti-discrimination laws are the type of independent statutes that should not be preempted under section 301.

Yet, in many cases, rights against discrimination are conditional. Often, they do not provide defined benefits to protected persons; instead, Professor Harper notes that his proposal is in some tension with current law, notably with *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), which upheld as not preempted, under the *Machinists* preemption doctrine, a state law that required employers who provide health benefits to also cover mental health treatment. Harper, supra note 28, at 728. As Professor Harper admits, the right at stake in *Metropolitan Life* was clearly conditional. He suggests a few ways to resolve this tension and ends up concluding that his argument may need to be limited to require the preemption only of state laws that merely add remedies to contract violations, as opposed to those that add substantive rights conditioned on the existence of other rights, in order to be consistent with current Supreme Court interpretation. Id. at 728-31.

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See, e.g., Stone, supra note 78, at 609 & n.38 (discussing the fact that courts rarely preempt employment discrimination claims); Adams, supra note 43, at 136, 138 (noting that discrimination claims generally are not preempted and arguing that this result is correct); Note, supra note 43, at 220-21 (arguing that no preemption should occur even if discrimination claim necessitates interpretation of collective agreement). But see White, supra note 21, at 425-28 (arguing for preemption of discrimination claims when resolution necessitates interpretation of collective agreement); Davis v. Johnson Controls, 21 F.3d 866 (8th Cir. 1994), reh'g denied, 1994 U.S. App. LEXIS 13587 (8th Cir. June 7, 1994), and cert. denied, 115 S. Ct. 426 (1994) (finding handicap discrimination claim preempted); Hunter v. H.L. Yoh Co., Civ. No. 93-3356, 1994 U.S. Dist. LEXIS 16298 (D.N.J. Oct. 21 1994) (finding race discrimination claim preempted) (designated not for publication).
they deem that whatever terms and conditions of employment are extended to a historically favored group must also be extended to members of the protected class. For example, if an employer agrees to a particular wage rate for a traditionally male job classification, it may unwittingly end up being forced to pay the same wage to women in a substantially similar job classification under an anti-discrimination statute. Consequently, in some instances rights against discrimination can cause uncertainty in negotiations because they can end up causing particular contract language to obligate an employer to do more than the employer thought it was obligating itself to do. Thus, at the very least, Professor Harper's test is over-inclusive.

This observation, however, does not answer the bigger question of whether the complication posed by conditional rights is ever sufficient to warrant preemption. I do not think that it is, because neither of the reasons that Professor Harper gives ultimately justifies preemption. His first argument—that uncertainty about conditional rights will scare employers away from the negotiating table—depends on the assumption that the employer does not have a thorough understanding of state law; this will make the employer concerned that whatever it agrees to could lead to unanticipated liability. It is just as plausible, however, that employers will respond to this concern by educating themselves as by dragging their feet in collective bargaining sessions. It is reasonable to assume that unionized employers are more likely than other employers to have an ongoing relationship with lawyers conversant with labor law. Being the subject of an organizing campaign serves as an impetus to seek legal advice from labor counsel, and it seems probable that most unionized employers continue to seek the advice of counsel during contract negotiations and when disputes arise during the life of the contract. Consequently, unionized employers are particularly well positioned to become apprised of their obligations under state employment laws. Of course, education about state law will not necessarily fully protect employers, since the law can change during the contract term. Sudden legal revolution is not an every day occurrence, however; education about the law thus can provide employers some measure of security.

178. See The Equal Pay Act of 1963, 29 U.S.C.A. § 206(d) (West 1978 & Supp. 1995) (requiring employers to pay equal wages to men and women if they perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," unless specific enumerated defenses apply).

Not all rights provided by anti-discrimination law are properly understood as conditional. These laws, for example, can also be used to set aside facially neutral employment practices that have a disparate impact on protected persons. See Griggs v Duke Power Co., 401 U.S. 424 (1971). Furthermore, some anti-discrimination statutes require that the employer make a reasonable accommodation for class members, rather than merely refraining from treating them less favorably than others. See Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e)(j) (West 1994) (requiring accommodation of religion); The Americans with Disabilities Act, 42 U.S.C.A. § 12101-12313 (West 1995).
Furthermore, as an extra incentive to oppose either unionization or entering contracts with a selected union, concern about unknown liabilities under conditional state laws can be no more than a drop in the bucket. Employers are strongly resistant to unionization and to entering collective agreements because both fetter their power over the workplace. Yet in many cases they must accept unionization and contracts because the union has sufficient power to insist. It is implausible that this generalized concern about state law liability will appreciably affect employer behavior or jeopardize the ultimate existence of particular collective bargaining agreements.

Professor Harper’s second argument—that the existence of conditional rights will make the employer hesitant to grant certain rights that the union might desire—depends upon the opposite assumption, that the employer will know about and respond to conditional state laws. The argument is that the employer will refuse to agree to particular terms of employment that the state has made more expensive by using them as a trigger for additional rights or remedies, even if these are terms that the union favors. The Supreme Court has faced the issue of whether federal law preempts such state laws under one of the other preemption doctrines recognized in labor law, Machinists preemption. Initially, the court agreed with the argument that it is inconsistent with the exclusive federal scheme of labor regulation for states to enact laws that affect the content of collective bargaining agreements. But later the Court abandoned this position (I believe cor-
In large part because such a result would penalize employees for unionizing. Until they unionize, employees are protected by a plethora of state law rights and remedies. It would be a perverse result if the act of unionizing, which is supposed to benefit employees, eliminated some of those rights. Although unions could try to negotiate similar contractual protections, they would be starting from a baseline negotiating position that is worse than that of non-unionized employees. They would have to trade off other desired benefits in order to receive what others get automatically. Thus, although state provision of conditional rights can pose a threat to the union’s ability to get its most desired package, this threat is justified by countervailing benefits.

Furthermore, state law provides that some conditional rights can be waived or limited by the parties. Unions can trade away such negotiable rights, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress.

Id. at 296-97.

183. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20-22 (1987) (holding that a negotiable state right to severance pay was not preempted); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (holding that a non-negotiable state right to mental health benefits in situations in which employer also provided hospitalization and surgical benefits was not preempted).

These cases relied on other reasons as well in holding that state laws that set minimum employment terms are not preempted by federal law. Specifically, the Supreme Court reasoned that federal labor law is directed at regulating the bargaining process and is unconcerned with the content of collective bargaining agreements. Thus, it is not inconsistent with federal law for a state to enact laws that affect the content of agreements. 482 U.S. at 20; 471 U.S. at 753-56. Furthermore, there “is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad of state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.” 471 U.S. at 756; see also 482 U.S. at 21-22.

184. Metropolitan Life, 471 U.S. at 756 ("It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers."); see also Herman, supra note 84, at 646-47 (discussing why Metropolitan Life was correctly decided); 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, 297-98 (1988).

185. See supra note 104 and accompanying text (discussing how altering the baseline for negotiations can have distributional effects). This is not to suggest that the holding in Oliver was wrong. To the contrary, it was clearly correct to hold that the state law at issue in that case was preempted by federal law. One of the central purposes behind the enactment of the NLRA was a desire that employees be permitted to band together for the purpose of raising their wages. See 29 U.S.C.A. § 151 (West 1986) (noting that the denial of the right to unionization caused a "diminution of... wages" and that "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association... depress[es] wage rates and the purchasing power of wage earners in industry and... prevent[s] the stabilization of competitive wage rates... within and between industries."). If the state antitrust law were allowed to operate to prohibit maintenance of rental rates for owner/operators, that purpose of the federal law would be frustrated in the context of the trucking industry. Hence, the state antitrust law as applied was inconsistent with the federal law.

186. The right at issue in Allis-Chalmers Corp. v. Lueck, to have disability insurance payments made in a good faith manner is an example of a conditional negotiable right. 471 U.S. 202, 203 (1985).
rights for benefits that they prefer. The only thing that changes if the state law is not preempted is the baseline from which negotiation starts. Consequently, in such cases, by not preempting state law, the union ends up with one more good in its basket that it can trade. This can make it more likely that the union will get its desired package in the end.\textsuperscript{187}

4. Conclusion

The need for a uniform law to facilitate collective bargaining and to minimize disputes under agreements does not justify the preemption of state individual employment rights laws. Labor contracts should always be interpreted under the principles provided by federal common law. This can be accomplished simply by requiring judges and juries to use the federal principles whenever interpreting an agreement, or, at the very least, to refer interpretation issues to an arbitrator for consideration and defer to the arbitrator's judgment. Although it is true that negotiations will be made more complicated if the parties must keep in mind that some conditional state laws may affect their financial exposure or provide for additional substantive rights, this point also does not require preemption of state laws. The existence of these state laws is unlikely to make otherwise willing employers suddenly oppose unionization or refuse to enter a contract. Moreover, preempting such laws would have the perverse effect of penalizing employees for unionizing. Finally, in those situations in which unions have the power to negotiate about these state rights, state law can actually assist unions in their quest to get their most favored package of employment terms.

B. The Need to Preserve the Central Role of Arbitration

The second justification voiced by the Supreme Court for section 301 preemption is the need to preserve the central role of the arbitrator as the interpreter of the collective bargaining agreement. In \textit{Lueck}, the Court cautioned that if state tort laws were not preempted, employees could recast contract claims as claims for "tortious breach of contract" and thereby get into court.\textsuperscript{188} Employers then would have little incentive to agree to arbitrate.

\textsuperscript{187} For a discussion of the distributional effects of legally assigning negotiable rights to unions, as opposed to management, see supra note 104 and accompanying text.

Providing employees with negotiable rights will not necessarily in all cases help the union get its most desired package. It is possible that the promulgation of state law might change employees' expectations such that they would be reluctant to allow the union to bargain away the new right even though absent state regulation the employees would not have had much desire for it. This can make it practically difficult for the union to waive the right, even if the union believes that, in the long run, some other benefit for which the right could be exchanged would better serve the employees' interest. See Leslie, supra note 104, at 256-57 & n.67.

\textsuperscript{188} 471 U.S. at 211.
arbitration clauses, since, in practice, employees could disregard them at will.\textsuperscript{189}

The importance of arbitration to our system of labor relations has been extensively chronicled.\textsuperscript{190} Since a collective bargaining agreement cannot hope to spell out clearly all of the rights and obligations of every person in the workplace, inevitably there will be disputes that arise during the life of the agreement. A grievance procedure culminating in arbitration provides a relatively cheap, quick, and fair method for adjudicating these disputes.\textsuperscript{191} It is a better alternative than judicial resolution, which is far from expeditious and cannot be invoked often because of its cost. Furthermore, as discussed above, there is reason to think that labor arbitrators selected by the parties will be more familiar with workplace realities and thus will render better decisions than would more distant judges.\textsuperscript{192} Arbitration is also a far better alternative than economic warfare, such as strikes and lock-outs, because it is cheaper for the parties and less costly for society.\textsuperscript{193} If permitting suits under state employment laws seriously threatened the future of arbitration of contractual grievances, that would be a strong argument in favor of broad preemption. As will be discussed below, however, my scheme will not ultimately threaten arbitration.\textsuperscript{194}

This concern about preserving the central role of arbitration is what led some lower courts, in the years before the Supreme Court decided \textit{Lingle v. Norge Division of Magic Chef, Inc.},\textsuperscript{195} to construe section 301 preemption extremely broadly, such that it preempted any state claim that paralleled a claim that could have been pursued under the collective bargaining agree-

\textsuperscript{189} Id. at 219-20.

\textsuperscript{190} See generally Craver, \textit{supra} note 151; Shulman, \textit{supra} note 151. Indeed, the LMRA itself provides that "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C.A. § 173(d) (West 1986); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-81 (1960) ("[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 and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."); United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Of course, not every commentator is enamored of arbitration as the method for resolving industrial disputes. See Katherine Van Wzel Stone, \textit{The Post-War Paradigm in American Labor Law}, 90 \textit{Yale L.J.} 1509, 1559-65 (1981); Stone, \textit{supra} note 78, at 629-31.

\textsuperscript{191} See Craver, \textit{supra} note 151, at 576 ("Grievance-arbitration procedures enable contracting parties to resolve their bargaining agreement disputes in an informal, inexpensive, and relatively expeditious manner.").

\textsuperscript{192} See \textit{supra} notes 150-151 and accompanying text.

\textsuperscript{193} See Warrior & Gulf Navigation Co., 363 U.S. at 578 (1960) (describing arbitration as "the substitute for industrial strife.").

\textsuperscript{194} See \textit{infra} notes 198-221 and accompanying text.

\textsuperscript{195} 486 U.S. 399 (1988).
Such a broad preemption scheme would absolutely protect the centrality of arbitration; if there were a potential for relief from the arbitrator, the employee would have to address her claims to the arbitrator rather than to a judge or jury. These courts, however, were misguided. Permitting state individual employment rights claims to proceed will not significantly undermine labor arbitration.

In the current scheme of section 301 preemption, not all workplace disputes between employees and employers in workplaces covered by collective bargaining agreements are adjudicated by arbitrators acting alone. Some disputes may go straight to court; others, like the dispute in Lingle, are heard both by an arbitrator and a court. My proposal to end section 301 preemption of state laws guaranteeing individual employment rights, therefore, represents simply a difference in the degree to which courts get involved in such disputes. It is an important difference in degree, however. Preemption has been found in numerous cases, and countless other cases were not brought because of fears that the claims would be found to be preempted. Therefore, under my scheme, there is reason to think that the number of workplace disputes heard by courts rather than, or in addition to, arbitrators would increase significantly.

My proposed scheme, however, would not mean an end to the centrality of arbitration as a means of resolving workplace disputes within unionized workplaces. In a number of cases, there will be no relevant state employment law on which the employee can rely. Most notably, state law usually helps only those employees who have been discharged; rarely can employees who are still employed but who have some grievance with their employer sue successfully. Even in discharge cases, state law does not always provide relief. For example, New York does not recognize any tort of "wrongful discharge." If an employee of a unionized New York company is discharged for allegedly arbitrary reasons, her only recourse is to ask for arbitration over the issue of whether the discharge violated the just

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197. 486 U.S. at 401-02.

198. See William B. Gould IV et al., When State and Federal Laws Collide: Preemption—Nightmare or Opportunity, 9 INDUS. REL. L.J. 4, 10 (1987) (presentation of William B. Gould IV) (noting that the argument that allowing unionized employees to bring individual lawsuits will undermine arbitration has been made in the past, but the decline never occurred).

199. There are some exceptions to this principle. For example, a current employee may be able to equalize a pay disparity by suing under an anti-discrimination law. But suits by current employees against their employers under state law are a rarity.

cause clause of the agreement. And even in states that do recognize wrongful discharge claims, the protection given by state law is not as broad as that provided by a just cause clause in a collective bargaining agreement. In other words, it is not true that every contract-based claim for breach of a collective bargaining agreement can be recast as a claim of tortious breach of contract.

Furthermore, in a significant number of cases, employees will forego their opportunity to bring a possible state tort suit. It is much more time consuming and expensive to bring a suit in court as opposed to bringing an arbitration action, especially since the union provides representation in arbitration but generally not in court actions. Hence, bringing suit in court will not be an attractive option to many employees. Moreover, it is unusual for state employment laws to provide for reinstatement of a discharged employee. Thus, an employee who wants to be reinstated in her job will need to apply to the arbitrator for relief. Finally, in discharge suits, "arbitrators normally place the burden of providing a work-related justification for employee termination on the employer." In contrast, in state law suits, the burden falls on the employee. Thus, in close cases, an employee may prefer to have the case heard by an arbitrator. Consequently, the costs to the system of arbitration imposed by my scheme are not likely to be staggering.

In favor of section 301 preemption, however, some commentators argue that allowing employees to bring state-law individual employment

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201. See infra notes 252-54, 257, 270-275 and accompanying text.

In fact, only a small minority of states recognize a cause of action in tort on the ground that an employer violated an implied covenant of good faith and fair dealing by discharging an employee. See Mark A. Rothstein et al., Employment Law § 9.6, at 537 (1994) ("A little more than one-fifth of the states have permitted the use of the implied-in-law covenant of good faith and fair dealing to challenge discharges or other employer actions in certain limited situations."); Arthur S. Leonard, A New Common Law of Employment Termination, 66 N.C. L. Rev. 631, 636, 653-57 (1988). Thus, in most states, an employee whose only claim is that she was discharged in bad faith can get redress, if at all, only from an arbitrator. See infra notes 270-283 and accompanying text (discussing the covenant of good faith and fair dealing). See also Note, supra note 43, at 229-30 ("Often CBA's contain rights greater than those provided by state law, and in such cases it would be advantageous for the plaintiff to file a grievance under the CBA.").

203. See Herman, supra note 84, at 653-54.
204. See Adams, supra note 43, at 132; Herman, supra note 84, at 653-54.
205. See Herman, supra note 84, at 653.
206. Leonard, supra note 202, at 646 & n.96.
207. Id.
208. It may be possible that a collective bargaining agreement can specifically preclude arbitration in cases in which an employee brings a court suit based on the same claim, thus precluding employees from double-dipping. See Harper, supra note 28, at 749-50 (proposing such a scheme). Thus, if an employee wanted to get the benefit of the more beneficial burden of proof, she would be forced to forego her opportunity to bring a suit in court.
rights claims in court would be inconsistent with the Supreme Court's decision in Republic Steel Corp. v. Maddox, which held that employees generally must exhaust the contractually-created grievance procedure before bringing to court claims based on alleged breaches of the collective bargaining agreement. Maddox was designed to prevent employees from making an end-run around the arbitration process. Commentators argue that, without preemption, employees will be able to have their employment grievances immediately addressed by courts applying state law, thus circumventing Maddox's requirement that disputes be presented first to an arbitrator.

Permitting employees to pursue state individual employment claims is not inconsistent with Maddox, however. In Maddox, as Justice Harlan pointed out, there was no benefit to be gained by allowing an employee to proceed immediately with a contract-based claim in court. Maddox thus only prohibits employees from avoiding the contractual grievance system in situations in which there is no good reason to permit them to do so. In contrast, when unionized employees seek redress under state law, the benefits of respecting state authority and not penalizing workers for unionizing, discussed above, apply. There is thus good reason to permit employees to make end-runs around arbitration in this situation.

Also in favor of preemption, some commentators argue that, absent broad preemption, employers will refuse to agree to arbitration clauses. But this claim does not withstand analysis. As the Supreme Court has pointed out several times, the arbitration clause in a collective bargaining agreement is considered to be the quid pro quo for a union's pledge not to

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210. id. at 652-53. Once the claimant has exhausted the grievance procedure, he or she may bring suit in court, but the court's role in the suit will be narrow. The court will only reverse the arbitrator's judgment if it does not "draw its essence" from the parties' agreement, United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), or if it conflicts with a well-defined, statutorily-based, public policy. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987).
211. See Korn, supra note 99, at 1171-72; see also, White, supra note 21, at 392-93 ("To permit unionized employees to bypass the arbitration procedure is to dilute its effectiveness, if not to call into question its very existence.").
212. As Justice Harlan put it, a rule that permitted an employee to bring suit without exhausting arbitral procedures:

has little to commend it... [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'
379 U.S. at 653 (quoting Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962)).
213. See supra note 95-111 and accompanying text.
214. See White, supra note 21, at 392-93; Gould et al., supra note 198, at 24 (remarks of David Rosenfeld); Comment, Employment At-Will in the Unionized Setting, 34 Cath. U. L. Rev. 979, 1017 (1985); Herman, supra note 84, at 653 (discussing other commentators' positions).
strike during the contract term,\textsuperscript{215} rather than a clause inserted in order to prevent individuals from seeking judicial remedies. Indeed, the Supreme Court has held that the relationship between the two clauses is so close that courts should imply a no-strike clause that is co-extensive with the scope of the arbitration clause.\textsuperscript{216} Furthermore, it has authorized the issuance of injunctions prohibiting strikes in violation of a no-strike clause if and only if the issue precipitating the strike is arbitrable.\textsuperscript{217} It is clearly in the employer's economic self-interest to have the union agree not to strike during the contract term and to be able to get an injunction if the union does strike.\textsuperscript{218} Consequently, there is still a strong incentive for the employer to agree to arbitration as a "substitute for industrial strife."\textsuperscript{219}

Furthermore, the existence of external state rights that can be asserted by unionized employees can make arbitration even more valuable to the employer.\textsuperscript{220} The availability of redress under an arbitration procedure may discourage employees from bringing state suits; the employee will not want to retain expensive legal services and suffer through the long delays engendered by our judicial process if the problem can be resolved adequately through internal methods. Consequently, employers may be willing to agree to arbitration clauses because, as a practical matter, they can forestall the necessity of spending money on more costly court proceedings.\textsuperscript{221}


\textsuperscript{216} Teamsters v. Lucas Flour, 369 U.S. 95, 194-96 (1962).

\textsuperscript{217} Buffalo Forge Co. v. United Steelworkers of Am., 428 U.S. 397, 406-09 (1976); Boys Markets, 398 U.S. at 253-55.

\textsuperscript{218} See Alexander v. Gardner-Denver Co., 415 U.S. 36, 54-55 (1974). In Alexander, the Court denied that it would "sound the death knell for arbitration clauses in labor contracts," id. at 54 (quoting 346 F. Supp. at 1019), if the Court were to permit a unionized employee to sue in court under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e)-2000(e)(17)(West 1994), after an arbitrator had denied a grievance under the collective bargaining agreement, which also raised the claim that the employee's discharge was racially motivated. Id. at 54-55. The Court reasoned that:

\[\text{[i]The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike... It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII. Indeed, the severe consequences of a strike may make an arbitration clause almost essential from both the employees' and the employer's perspective.}\]

\textit{Id.}


\textsuperscript{220} See Coleman, supra note 43, at 407 (noting that an employer may benefit from permitting arbitration of non-preempted claims because "a favorable decision [by the arbitrator]... is strong evidence of the propriety of the discharge, and an arbitration transcript can be used to impeach the grievant's credibility.").

\textsuperscript{221} As the Supreme Court has explained, in the context of permitting parallel suits under Title VII even when a collective bargaining agreement also prohibits employment discrimination:

\textit{Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a}
Hence, the argument that section 301 preemption stands as a necessary bulwark to prevent the collapse of labor arbitration is misplaced.

Thus, permitting state individual employment rights suits to proceed would not undermine significantly the federal policy in favor of having arbitrators interpret collective bargaining agreements. Most individual disputes would still be heard by arbitrators, and employers would continue to have incentives to agree to arbitration clauses. Consequently, given the strong state interest in preserving these laws, and the lack of any serious interference with federal policies that their preservation would cause, one should not assume that Congress intended such laws to be preempted. Employees whose employment is covered by a collective bargaining agreement should be entitled to make use of them on the same basis as other employees.

V
RESPONDING TO OTHER POLICY ARGUMENTS FOR PREEMPTION

A. The Effect of Section 301 Preemption on Union Density

Some commentators have argued that if courts fail to engage in such broad preemption, that will discourage unionization. These proponents of preemption argue that if unionized employees are freely permitted to seek redress for grievances in court, they will no longer feel beholden to their unions and thus will abandon them.222 Conversely, other commentators argue that broadly preempting a wide range of individual employment rights claims, courts will discourage unionization. These critics of preemption argue that employees may be reluctant to unionize if they realize that by doing so they are giving up rights that they otherwise would have had under state law.223 This question of the effect of preemption on union density has never been a part of the Supreme Court’s analysis in section 301 cases, because section 301 was not enacted for the purpose of increasing union density.224 But for those of us who believe unions are a desirable institution, this is an important question to address.

Both of the arguments miss the mark, however. In the end, the scope of section 301 preemption of state individual employment laws is likely to

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222. See, e.g., Stone, supra note 78, at 619 (discussing 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)); Herman, supra note 84, at 657-58.
223. See, e.g., Gould et al., supra note 198, at 24-25 (presentation of David Rosenfeld); White, supra note 21, at 392-93; Comment, supra note 214, at 1017-18.
have little effect on union density.\textsuperscript{225} Permitting suits asserting state individual employment rights will not undermine employees' perceived need for unions. Unions will still be able to offer employees benefits that employees cannot garner through state law. As one respected study of the union movement concluded, the most important benefit that unions provide to their members is an increased voice in workplace affairs.\textsuperscript{226} State individual employment rights laws do not provide an adequate mechanism for employees to voice their opinions and complaints during the life of the employment relationship.\textsuperscript{227} Consequently, many problems that arise during the course of employment can only be remedied by a union utilizing the contractual grievance process. Furthermore, even for discharged employees, state law generally will not provide substantive protection as extensive as that provided by the collective bargaining agreement.\textsuperscript{228} And, not all employees will have the ability to get the legal counsel generally necessary to pursue a state law claim.\textsuperscript{229} State individual employment rights laws simply do not provide an effective substitute for unionization, and there is no reason to think that employees will be misled into thinking that they do.

However, the converse is not true either—it is not likely that broadly preempting state tort law would cause employees to stay away from unions. It is improbable that most workers who potentially could join unions understand what their rights are under state law. It is even less likely that they will understand that, under current law, section 301 preemption may deprive them of some of those rights. Finally, it is still even more implausible that the employee will see the bringing of a lawsuit against the employer as such a realistic possibility as to dissuade her from voting for the union if she thought by doing so she would lose that right.

Judge Kozinski of the United States Court of Appeals for the Ninth Circuit has argued that employers will inform employees of the detriment caused by section 301 preemption in order to forestall unionization.\textsuperscript{230} This seems unlikely, however. 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. In the end, even for those committed to unionization, the decision about the proper scope of section

\begin{itemize}
\item \textsuperscript{225} Cf. Thomas A. Kochan et al., \textit{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 declines. Reversing union membership trends will take more than labor law reforms.").
\item \textsuperscript{226} Freeman & Medoff, \textit{supra} note 179, at 7-11; see also Rabin, \textit{supra} note 189, at 218 (arguing that unions provide both voice and an ability to enforce rights, which he terms "muscle").
\item \textsuperscript{227} See Rabin, \textit{supra} note 180, at 198.
\item \textsuperscript{228} See \textit{infra} notes 252-83 and accompanying text (discussing state wrongful discharge actions).
\item \textsuperscript{229} See Herman, \textit{supra} note 84, at 656-58.
\item \textsuperscript{230} Livadas v. Aubrey, 943 F.2d 1140, 1150 n.2 (9th Cir. 1991) (Kozinski, J. dissenting), rev'd \textit{sub nom} Livadas v. Bradshaw, 114 S. Ct. 2068 (1994).
\end{itemize}
301 preemption must be made on some basis other than its effect on union density.

B. The Effect of Section 301 Preemption on Multi-State Employers

One might also argue for a broad interpretation of section 301 preemption from the perspective of an employer who operates in more than one state. Dealing with a myriad of different state employment laws is a complex and frustrating task. How much better for these employers if, in the event that they are unionized and agree to a collective bargaining agreement, they are insulated from many suits based on state law.

In the end, however, this argument does not justify section 301 preemption. It is beyond the scope of this article to discuss at length the issue of whether employment law in general should be federalized. It is worth noting, however, that there are strong arguments to be made in favor of letting states continue to create individual employment rights. Since the majority of American workers do not work for multi-state enterprises, it seems strange to let concern for such enterprises completely drive our decision about how our labor laws should be structured. In addition, there are real and obvious costs to centralizing regulation in this way. Because of the larger constituency involved, federal regulation is less directly democratic; employers and employees from any given area can have less to say about the content of federal law. Furthermore, the states, whose laws touch fewer people, can afford to experiment with employment rights and can learn from each others' attempts to create workable employment schemes in a way in which the federal government cannot. Finally, those of us who care about workers' rights will worry that exclusive federal standards will dilute the protections granted to workers by some of the states.

But even if one accepts that a uniform federal scheme of employment law would be desirable, section 301 preemption is not the proper way to achieve this goal. As noted above, section 301 can only preempt state tort law in situations in which the employees are unionized and their employment is governed by a collective bargaining agreement. Yet there are many multi-state employers who do not meet these conditions. Hence, using section 301 to create a uniform law of employment would be grossly underinclusive. Indeed, some employers have some operations that are unionized and others that are not; preempting state laws only for the unionized employees would not give these employers the simplicity of regulation that they seek. Furthermore, section 301 preemption with its current complexity is not really a boon for multi-state employers. The law is so confused about which state torts are preempted that such employers could have little re-

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231. In any case, it is far from clear that Congress has the power under the Commerce Clause to regulate the employment relationships between workers and small local employers. Cf. U.S. v. Lopez, 115 S. Ct. 1624 (1995) (reinvigorating the Commerce Clause restriction on federal power).
pose. The proper recourse for those who seek such federalization of employment law, instead of arguing for broad section 301 preemption, is to ask Congress to legislate uniform standards for all employees, including those who are not represented by unions.

VI
SOME SPECIFIC EXAMPLES

Doing away with section 301 preemption except in actual contract law suits to enforce a collective bargaining agreement would simplify the law considerably. Many cases that have given courts trouble in the past and sometimes divided the circuits would now have clear outcomes. For example, suits under state laws prohibiting discrimination against the disabled would not be preempted. It would not matter whether the particular state law requires the employer to make reasonable accommodations for disabled employees or if the statute specifically requires unionized employers to consult their collective bargaining agreements in determining whether particular accommodations are reasonable.232 Similarly suits alleging inten-


In Davis, the Eighth Circuit, interpreting a Missouri disability discrimination law, held that the law was preempted by section 301 because it specifically requires courts to look at collective bargaining agreements when deciding whether a particular proposed accommodation is reasonable. 21 F.3d at 868. Other state laws that do not require consultation of the agreement would survive. See Martin Marietta Corp., 38 F.3d at 1401; Kube, 865 F. Supp. at 229 n.4. This reasoning makes state laws that are the most solicitous of collective bargaining agreements the most vulnerable to preemption. This is a perverse result to occur under a doctrine that is supposedly designed to protect the integrity of collective bargaining agreements.
tional infliction of emotional distress, defamation, or the right to privacy would not be preempted.

There are still a couple of categories of cases, however, that deserve some more attention because their resolution is not quite as simple. The first are cases that are directed against the union rather than the employer and that are related to the collective bargaining agreement. The second are wrongful discharge suits, which can be brought under several state law theories.

A. Suits against Unions

Suits against unions could be brought under two different theories. Individual employees could sue a union under a breach of contract theory, arguing that the union breached a duty owed to them as third party beneficiaries of the contract—for example, a duty to keep the workplace safe. Such suits would clearly be suits for the enforcement of a collective bargaining agreement, and hence could only be brought under section 301. State contract law would be preempted to the extent that it otherwise could apply in such suits, under a direct application of the Lucas Flour decision.

The result also makes little sense because federal and state courts are empowered to hear claims under the federal Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101-12313 (West 1995), even if such claims are brought by unionized employees. Regulations interpreting the ADA adopted by the Equal Employment Opportunity Commission require courts when determining the essential functions of the job to consider any collective bargaining agreement that is in force. 29 C.F.R. § 1630.2 (1995). Consequently, under current law, courts already engage in the type of contract interpretation that the Eighth Circuit was trying to forestall in Davis.

For a different approach to the issue whether disability discrimination claims should be preempted, see Rabin, supra note 180, at 244-49 (arguing that such claims should be heard first by arbitrators, but that judges should apply a more rigorous standard of review than is traditional in judicial review of arbitration).

233. The split among courts on whether this tort is preempted is documented in Stone, supra note 78, at 612-15.

234. See Commodore v. University Mechanical Contractors, Inc., 839 P.2d 314, 321 (Wash. 1992) (holding a defamation claim not preempted); Adams, supra note 43, 111-12, 136 (discussing the treatment of defamation claim in Commodore); Stone, supra note 78, at 608 & n.133 (documenting cases in which courts have found defamation claims to be preempted); Coleman, supra note 43, at 399-400 (noting split in courts with regard to preemption of defamation claims); White, supra note 21, at 417-19 (discussing cases involving preemption of defamation claims that have gone opposing ways and arguing for preemption).

235. Privacy claims have generally been held to be preempted. See Stone, supra note 78, at 607-608 & nn. 131, 134.

236. Some cases that had clear outcomes would still have clear outcomes, but would go the other way. For example, cases involving negotiable state torts—like the tort at issue in Allis-Chalmers v. Lueck, 471 U.S. 202, 203 (1985)—would not be preempted. In other easy cases, the results would remain the same. For example, sex, age, and race discrimination claims would continue to be free from preemption. See Stone, supra note 78, at 609 & n.138 (discussing the current non-preemption of sex, age and race discrimination claims).

237. See supra note 154 (discussing why Lucas Flour was correctly decided).
A more complicated issue, however, arises when the individual claims that the union violated a duty created under state tort law to keep the workplace safe. This argument was made in two cases that reached the Supreme Court, *International Brotherhood of Electrical Workers v. Hechler*\(^{238}\) and *United Steelworkers of America v. Rawson*.\(^{239}\) In *Hechler*, the plaintiff argued that the union had agreed to keep the workplace safe and that a violation of this contractual duty also violated Florida's tort law.\(^{240}\) In *Rawson*, the Idaho Supreme Court, held that the fact that the union had inspected a mine, as opposed to its contractual commitment to inspect the mine, placed upon the union a duty to the employees under state tort law to inspect it in a non-negligent manner.\(^{241}\) In both cases, the Supreme Court found the tort claims to be preempted.\(^{242}\)

Under my approach, the employee in *Hechler* would still lose, but for a different reason. The tort claim in *Hechler* would not be preempted, but the court would be required to use principles of federal common law interstitially in deciding how to interpret the contract. As discussed above, federal common law principles bar courts from interpreting collective bargaining agreements so as to find that unions have assumed enforceable duties to individual employees, unless the employee can demonstrate specific language creating such a duty.\(^{243}\) Apparently, there was no such language in the collective bargaining agreement in *Hechler*. Indeed, such language would be rare in any collective bargaining agreement, because neither party, union or management, has a strong incentive to bargain to create such individual rights. Thus, the union still wins in *Hechler*.

*Rawson*, however, presents a more difficult problem. There, the state court premised the union’s duty not on the collective bargaining agreement but on the fact of inspection.\(^{244}\) Thus, appeals to federal common law principles of narrow contract construction do not assist the union.

\(^{240}\) 481 U.S. at 853.
\(^{241}\) 495 U.S. at 367-68.
\(^{242}\) *Hechler*, 481 U.S. at 865-66; *Rawson*, 495 U.S. at 371.
\(^{243}\) See *supra* notes 125 and accompanying text.
\(^{244}\) In *Rawson*, a majority of the U.S. Supreme Court took the position that the Idaho Supreme Court erred when it said that the act of inspection itself gave rise to tort liability under Idaho law. Instead, the Court concluded that any tort liability must have ultimately been rooted in the union’s obligation to inspect created by the collective bargaining agreement. 495 U.S. at 371; see *id.* at 377-79 (Kennedy, J. dissenting) (pointing out that the Idaho Supreme Court reached its conclusion without relying on the contract and noting that the majority decision was based on “doubts that the Idaho Supreme Court means what it seems to have said,” based on a “labored interpretation” of that court’s opinions). The majority reasoned that the contractual relationship was necessary for liability here, because the Supreme Court of Idaho would not have held that “any casual visitor in the mine would be liable for violating some duty to the miners if the visitor failed to report obvious defects to the appropriate authorities.” *Id.* at 371.

This reasoning, however, is troubling. The U.S. Supreme Court is supposed to defer to the state court’s judgment about the meaning of that state’s law. See *id.* at 378 (Kennedy, J., dissenting) (“[W]e
This does not mean that the result in Rawson was wrong or that the employees should have won, however, for two reasons. First, states should not permit these suits under their own tort law principles. Employees bring such suits against unions, rather than suing the negligent employer, in order to avoid the strictures of state workers’ compensation laws, which severely limit the amount that the employee can collect from her employer. The political compromise underlying workers’ compensation laws involves a trade-off by which employees are more certain to recover but give up the potential of receiving very large damage awards. There is no reason to allow employees to avoid this political compromise by permitting them to go after the union’s deep pockets because of the fortuity that they happen to be represented by a union.

Furthermore, use of state law in this way could discourage unions from taking any role in monitoring plant safety for fear that undertaking such a role will expose them to massive liability. Such an effect likely would lead to decreases in worker safety in contravention of the pro-safety public policy that state tort law was designed to promote. Thus, by finding the union potentially liable in this situation, the Idaho Supreme Court undermined the purpose underlying its tort law.

Second, and more significantly for our present preemption purposes, permitting liability in cases like this would also interfere with employees’ ability to have the union represent them in a way that they might deem desirable. The employees may want their union to perform safety inspections on their behalf, but the union may be reluctant to do so if it knows that performing such inspections potentially would expose it to liability.

In light of this, it might be proper to preempt these suits; this preemption, however, would not be rooted in section 301, but in the fact that this application of tort law abridges rights granted by the NLRA. The NLRA makes a duly selected union the exclusive representative of the employees in a given bargaining unit. As part of this duty, the union is empowered to represent the employees in negotiations with respect to “wages, hours, and other terms and conditions of employment,” the so-called mandatory subjects of bargaining. Safety conditions at a plant are clearly part of the

245. See Rothstein et al., supra note 211, § 7.3, at 406.
248. Id. at § 158(d).
conditions of employment about which the union represents the employees. Burdening the ability of unions to represent employees in the way they see fit by attaching the possibility of tort liability every time the union performs a safety inspection interferes with this federal scheme and abridges the employees' right to have their union represent them on these matters.

It is true that the Supreme Court has held that states can affect the terms of collective bargaining agreements; states are permitted to enact minimum labor standards. However, these decisions do not preclude the preemption of any and all state tort laws that influence the outcome of collective bargaining. There are several relevant differences between the laws at issue in the minimum standards cases and the state tort law at issue in Rawson. First, in the cases upholding the state's rights to enact minimum labor standards, the Supreme Court relied heavily on evidence that Congress legislated fully cognizant of the fact that state minimum rights laws existed. Congressional silence in the face of this knowledge implied ratification of these state statutes. Application of tort law in the manner used in Rawson, however, was likely unforeseen, and therefore not ratified by Congress. Second, the state's interest in salvaging its law is much weaker here than in the minimum labor standards cases. As noted above, applying the law in the manner that the state sought to apply it in Rawson actually undermines the state's apparent purpose of protecting worker safety. The strength of the state interest in holding the union liable is also suspect given that it was willing to limit the liability of the employer, the party who had more control of the premises and thus was more responsible for the safety lapse. Finally, unlike the state minimum labor standards cases, preemption of Idaho tort law would not penalize employees for unionizing. Both union and non-union workers would be relegated to the workers' compensation system to receive redress for their workplace injuries. Thus, it was correct for the Supreme Court to preempt the state's application of its tort law in Rawson, but not by reference to section 301.

B. Wrongful Discharge Suits

Another category of cases that deserves specific attention are cases brought under state law alleging that an employee has been wrongfully discharged. Such suits come in three varieties. First, some states have held that an employer is liable in tort if it discharges an employee in violation of public policy. State courts differ in their decisions about what constitutes

249. See supra note 183 and accompanying text (discussing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), and Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)).
250. See supra notes 183-187 and accompanying text.
251. Fort Halifax, 482 U.S. at 20-21; Metropolitan Life, 471 U.S. at 756.
252. See Rothstein et al., supra note 202, § 9.9, at 542-54 ("Every state except Alabama Florida, Georgia, Louisiana, New York, and Rhode Island, recognizes the public policy exception to the employ-
public policy, but they are uniform in agreeing that creating a public policy exception to employment-at-will is not the same thing as prohibiting discharge except for just cause.\footnote{253} Employers can generally fire employees for any reason unless that reason runs afoul of a narrow range of “clear and substantial” public policies adopted by the state.\footnote{254}

Courts have split as to whether such tort suits are currently preempted under section 301.\footnote{255} Under my approach, they clearly would not be. Such suits are not breach of contract suits alleging violation of a collective bargaining agreement. Hence, they may proceed.\footnote{256}

Second, some states permit employees to sue their employers for breach of implied employment contracts, based on verbal representations made to the employee about continued employment, written representations made in an employee handbook, or past employment practices.\footnote{257} In dealing with the issue whether such claims are preempted, courts have often divided these implied contract claims into two categories—those in which the implied contract allegedly arose before the employee was covered by the collective bargaining agreement and those that allegedly arose while the employee was covered by the agreement. Relying on \textit{Caterpillar Inc. v. Williams},\footnote{258} most courts have held that claims in the first category are not


\footnote{253} See \textit{Rothstein et al.}, supra note 202, § 9.9, at 543.

\footnote{254} Id. § 9-10, at 543.


\footnote{256} Other commentators have argued that these suits should not be preempted. See, e.g., Herman, supra note 84, at 635-37. Commentators who extol adoption of the public right version of the dependence test would also, presumably, argue that such claims should not be preempted, since they have a source external to the collective bargaining agreement. See Note, supra note 43, at 225-28; Adams, supra note 43, at 125-27.

\footnote{257} Indeed, even under current law, these suits should usually be found not to be preempted. Applying the negotiability test, the rights at stake in these cases are generally not negotiable. Applying the public law version of the dependence test, these rights emanate from the state's policy, not the collective bargaining agreement. Finally, applying the quantum of contract interpretation version of the dependence test, these suits will rarely involve anything more than tangential contract interpretation. The central issues in such cases will generally involve the question of what really motivated the employer to terminate the employee and the question whether the motive that the employee claims is, in fact, prohibited by the state's public policy; neither of these questions generally necessitate interpretation of the employee's rights under the collective bargaining agreement.

\footnote{258} See \textit{Rothstein et al.}, supra note 202, §§ 9.3-9.5, at 525-37; Peck, supra note 252, at 735-38.

\footnote{255} 482 U.S. 386 (1987); see supra notes 48-68 and accompanying text (discussing \textit{Caterpillar}).
preempted.\(^{259}\) In contrast, courts generally have held claims in the second category to be preempted.\(^{260}\) This creates an odd result. If an employer promises an employee long term job security to induce her to work before she is a covered employee, then it is likely that if she is immediately terminated, she will be able to bring suit under state contract law to enforce the individual implied contract. If, instead, the promise was made after she had been on the job for a short while in order to induce her to stay on, any state right she would have had would likely be preempted.

Under my theory, no such temporal distinction needs to be drawn in order to resolve the question of preemption. Because these suits are not suits for the enforcement of a collective bargaining agreement, but instead suits to enforce individual contracts, they are not preempted under section 301.

That does not necessarily mean, however, that any plaintiff who can make out a prima facie case of a violation of such an individual employment agreement should necessarily win in the end. First, as the Supreme Court pointed out in \textit{Caterpillar}, the state court must address the issue of whether the employees waived their state rights through the collective bargaining agreement.\(^{261}\) I have suggested earlier that, although the language of the collective bargaining agreement should be interpreted using federal law, the question of whether a state right has been waived should be an issue of state law.\(^{262}\) If the court finds waiver, then, obviously, the state law claim must be dismissed.

Second, the state contract claim may be preempted, although not under section 301. Recognizing that individual employment contracts could conflict with the principles embodied in the NLRA, the Supreme Court held early on that employers may not enter individual employment agreements with unionized employees if those agreements purport to subtract from the rights granted by the collective bargaining agreement.\(^{263}\) To rule otherwise would undermine the purpose behind the NLRA to permit employees to use their joint bargaining strength to secure better terms of employment.\(^{264}\)

This does not mean that there can be no individual agreements between represented employees and their employers. As the Court noted, the collective bargaining agreement generally will not specify which persons the employer will employ; consequently, it is necessary for the employer to

\(^{259}\) See Stone, \textit{supra} note 78, at 608 & n.137.

\(^{260}\) See \textit{id.} at 607 & n.132.

\(^{261}\) 482 U.S. at 398.

\(^{262}\) See \textit{supra} note 136 and accompanying text.

\(^{263}\) J.I. Case Co. v. NLRB, 321 U.S. 332, 336 (1943) ("The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits . . . ."); \textit{id.} at 338 ("[T]he individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement.").

\(^{264}\) \textit{id.} at 338.
enter into individual "contracts of hiring" with each particular employee.\textsuperscript{265} Furthermore, with regard to contracts that are more beneficial to the employee than the collective bargaining agreement, the Court was more cryptic. It noted that such individual agreements can be destructive of collective rights and industrial peace, because they cause divisions in the group.\textsuperscript{266} However, rather than prohibiting such individual agreements in all circumstances, the Court stated that "[i]ndividual 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 contract applicable, and to the Labor Board if they constitute unfair labor practices."\textsuperscript{267}

It thus should fall on the courts deciding the breach of individual contract cases to decide whether the existence of a particular alleged individual contract is permissible or, instead, conflicts with federal labor law principles. It is beyond the scope of this article to come up with a solution to the issue of which individual contracts may exist and which should be rendered unenforceable because inconsistent with some principle of federal labor law apart from section 301. Nonetheless, some preliminary thoughts are in order.

The inquiry as to whether a given individual agreement should be enforced would center around whether giving effect to the agreement will undermine rights or powers guaranteed by the federal labor laws, such as the right to have the employer bargain in good faith with the union\textsuperscript{268} or the union’s status as the employees’ exclusive representative.\textsuperscript{269} One question that courts facing this issue would need to ask is whether federal policy requires that employers be discouraged from entering into the type of individual agreement at issue in the case. They must also ask whether refusing to enforce the alleged individual agreement would in fact discourage the employer from entering into such agreements in the future. One can argue that, perversely, non-enforcement of such agreements will encourage em-

\textsuperscript{265} Id. at 335-36.

\textsuperscript{266} Id. at 338-339. As the Court put it:

[\textit{A}dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices.}

\textit{Id.}

\textsuperscript{267} Id. at 339. \textit{See also Caterpillar v. Williams}, 482 U.S. 386, 396 (1987) (holding that \textit{J.I. Case "does not stand for the proposition that all individual contracts are subsumed into, or eliminated by, the collective bargaining agreement."}); S. Richard Pincus & Justine R. Dial, \textit{Federal Preemption of State Law Claims}, 4 LAB. LAWYER 53, 56 (1988) ("[l]ndividual contracts are not necessarily subsumed or preempted by the existence of a collective bargaining agreement.").

\textsuperscript{268} 29 U.S.C.A. § 158(a)(5), § 158(d) (West 1986) (requiring employers to bargain in good faith with the employees’ duly selected representative).

\textsuperscript{269} Id. at § 159(a).
ployers to engage in such individual dealings. It is likely that many employees will not know enough about the law to understand that such individual agreements might be unenforceable. This ignorance would permit employers to take advantage of the benefits that such agreements provide, in terms of attracting and retaining particular employees and perhaps undermining union strength, while lack of enforcement would absolve the employers of the cost of honoring their commitments. Consequently, even if it makes sense for the NLRB to hold that it constitutes an unfair labor practice for employers to enter into some individual agreements that are advantageous to the particular individuals, it might still make sense to permit their enforcement in state contract law suits brought by the individual employees.

The final type of wrongful discharge action that some states recognize involves allegations that the employer breached its duty of good faith and fair dealing that inheres in every contractual relationship. This theory is recognized only in about one-fifth of the states. According to a leading treatise on employment law, cases finding liability under this theory have involved a fairly narrow range of conduct. Most cases in which the plaintiff has been successful have involved allegations that the employer fired the employee in order to deny her a benefit that she had already earned. A few other cases involve situations in which the employer engaged in “extreme overreaching,” not otherwise redressable by law. Only decisions in California and Alaska seem broader than this. Commentators have split as to whether such claims should be preempted by

271. ROTHSTEIN ET AL., supra note 202, § 9.6, at 537.
272. Id.; see also Peck, supra note 252, at 740 (noting that most courts that recognize the covenant of good faith and fair dealing in the employment context do not consider it to be tantamount to a requirement that the employee can only be fired for just or good cause).
274. Id. at 538 (citing Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (sexual harassment); Merrill v. Crothall-American, Inc., 606 A.2d 96 (Del. 1992) (deliberately misleading employee about tenure of employment)).
275. Id. at 539. The authors of the treatise explain that under California law it is arguable that the covenant of good faith and fair dealing precludes employers from discharging long-term employees without good cause. Id. (discussing Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443 (1980)). The authors note, however, that California has recently been moving toward a narrower interpretation of the scope of the protection provided by the covenant of good faith and fair dealing. Id. (discussing Foley v. Interactive Date Corp., 765 P.2d 373 (Cal. 1988)).

Alaska, in contrast, “channels all of its wrongful discharge litigation through the implied covenant doctrine.” Id. The authors note that, “[i]n practice, this appears to mean that an employer must treat like employees alike, that an employer may not fire or suspend employees for reasons that violate public policy, and that a public employer may not fire an employee for an unconstitutional reason, but it does not mean that all employment relationships have a just cause requirement imposed on them.” Id.
section 301, although courts generally have found these claims to be preempted.

The covenant of good faith and fair dealing cases pose a difficult puzzle under my theory because sometimes they can be considered to be contract law suits for the enforcement of a collective bargaining agreement. The covenant of good faith and fair dealing originally grew out of contract law, and most states still consider such claims to sound in contract, limiting successful plaintiffs to contract damages. To the extent that these suits allege that the covenant inheres as part of the collective bargaining agreement, arguably they should be preempted under a straightforward application of the preemption principle announced in *Teamsters v. Lucas Flour*.

However, the matter is not so simple. Other states treat suits under the covenant of good faith and fair dealing as tort suits and award full tort damages. Under my theory, such suits should not be preempted since they are not contract law suits. It would make little sense, however, to have the issue of preemption turn on the state's characterization of covenant claims as sounding in contract or tort. The substance of the claims is the same, and it is perverse to preempt only those claims that provide for the lower measure of damages.

Furthermore, a plaintiff in a state that considers such claims to sound in contract could avoid preemption under my principles through creative pleading. She could argue that she is basing her claim not on an allegation that the employer breached the covenant inherent in the collective bargain-

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276. Compare Note, supra note 43, at 225 (arguing in favor of preemption of such claims) and Note, Federal Labor Law Preemption of State Wrongful Discharge Claims, 58 U. Cin. L. Rev. 491, 521 (1989) (same) with Herman, supra note 84, at 637-38 (arguing against preemption of such claims).


278. See supra note 8-9 and accompanying text (discussing development of the covenant of good faith and fair dealing).


280. See supra note 8-9 and accompanying text (discussing *Lucas Flour*).

ing agreement but instead on the covenant inherent in the individual hiring agreement that existed between her and her employer. As I noted above, I do not believe that such claims of breach of an individual agreement should be preempted under section 301.282

The way out of this dilemma is to analyze the substance of claims of breach of the covenant of good faith and fair dealing. Are these claims like other claims for redress for breach of a collective bargaining agreement? Are they claims for the enforcement of rights garnered from the employer by the union through the contract? Or are they different, more like the independent employment rights claims that I seek to preserve? The answer is that rights provided by the covenant of good faith and fair dealing are more like other individual employment rights. Similar to the public policy wrongful discharge cases, the covenant cases involve court decisions as to whether the employer has done anything extremely unfair to the employee, without reference to any particular contractual provision. Hence, these claims should not be preempted.

Indeed, this result becomes even clearer if we again consider the policies behind section 301 preemption. Permitting suits alleging breach of the covenant of good faith would not threaten the need for uniformity of law with which to interpret agreements. The express and implied-in-fact terms of the contract would still be interpreted under the principles of federal common law. Furthermore, although the content of the implied-in-law covenant would be provided by state law, this would not complicate contract negotiations any more than does the existence of any external right provided by state law.

And, permitting such claims to proceed would not seriously threaten arbitration. Only a small minority of states recognize this cause of action at all, and, as discussed above, those that do generally apply it in a fairly limited manner. Hence, there will only be a handful of cases in any year in which the unionized employee has the potential of bringing a successful covenant of good faith claim. Furthermore, as noted above, in these cases, like all others, there will still be powerful incentives for employees to avail themselves of arbitration.283 Hence, these suits should be permitted to proceed.

VII
CONCLUSION

Section 301 preemption of individual employment rights claims hurts. In its current form, it hurts the federal courts by clogging them with suits involving complicated gatekeeping issues, cases that would be better resolved in state courts on the merits. Also, it can hurt both employees and

282. See supra notes 257-269 and accompanying text.
283. See supra notes 198-208 and accompanying text.
employers who bear the costs of litigating these complex issues. Furthermore, in any form, section 301 preemption hurts the states by thwarting their legitimate employment policies. Finally, it hurts employees covered by collective bargaining agreements by depriving them of rights and remedies that they otherwise would have had.

This injury is not justified by the policies that allegedly animate the doctrine. The need for a uniform law to govern the interpretation of collective bargaining agreements can be met by requiring courts adjudicating state law claims to use federal law interstitially whenever such interpretation issues arise. In addition, a roll back in section 301 preemption would not seriously threaten the role of the arbitrator as primary interpreter of the collective bargaining agreement. Most employment disputes in unionized workplaces would continue to be resolved by arbitrators, and employers would still have strong incentives to agree to arbitration clauses. It is time to cut back section 301 preemption and to allow employees who are covered by collective bargaining agreements to assert state individual employment rights claims.