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Struggling Through the Thicket: Section 301 and the Washington Supreme Court

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Struggling Through the Thicket: Section 301 and the Washington Supreme Court

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In this article, Professor Adams examines preemption doctrine under section 301 of the Labor Management Relations Act, focusing primarily on the Washington Supreme Court's 1992 decision in Commodore v. University Mechanical Contractors, Inc. *The author traces the history of section 301 cases, comparing two different theories regarding its correct application. Under one theory, an employee's state law claim will be preempted if the underlying right is negotiable or if the employer's defenses implicate the collective bargaining agreement. Under the second theory, an employee's state law claim is preempted only when the right at issue derives from the provisions of a collective bargaining agreement; on the other hand, an employee's state law claim will not be preempted if it is based on an independent state law duty. Professor Adams argues that the Washington Supreme Court, in adopting the second theory of section 301 preemption, has remained faithful to the United States Supreme Court's "complete preemption" doctrine, while providing parties to collective bargaining agreements with a consistent method of adjudicating state law claims. He notes, however, a trend in lower federal courts and in state courts toward adoption of the first model and argues that if allowed to continue, that trend will be detrimental to the ability of unions to recruit employees and effectively bargain to protect their rights.*

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I
INTRODUCTION

Preemption under section 301 of the Labor Management Relations Act[1] has been described as a "thicket," a "tangled and confusing interplay between federal and state law" and "one of the most confusing areas of federal court litigation."[2] Despite recent efforts by the United States Supreme Court to eliminate the confusion,[3] lower federal courts and state courts continue to struggle with this issue. A recent Washington Supreme Court decision, *Commodore v. University Mechanical Contractors, Inc.*,[4] exemplifies the difficulty courts have experienced in applying the section 301 preemption doctrine developed by the Supreme Court. However, the bright-line test announced in the decision provides a path through the chaos and is supported by the Supreme Court's analysis in its line of section 301 cases.

Confusion over the interpretation of section 301 is created by the tension between federal labor policy and the numerous employment rights created by state legislatures and courts. The National Labor Relations Act (NLRA)[5] was the first federal law recognizing the right of workers to form a union.[6] The NLRA was designed to remedy disruption in interstate com-

1. 29 U.S.C.A. §§ 141-197 (West 1982 & Supp. 1993) (Taft-Hartley Act).

2. Galvez v. Kuhn, 933 F.2d 773, 774, 776 (9th Cir. 1991) (quoting Stephanie R. Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 YALE L.J. 209, 209 (1989-90)); *see also* Singh v. Lunalilo, 779 F. Supp. 1265, 1268 (D. Haw. 1991) (commenting on problem of reconciling the "dozens, if not hundreds, of federal cases addressing the issue of the scope of section 301 pre-emption of state law claims."); Geri J. Yonover, *Preemption of State Tort Remedies for Wrongful Discharge in the Aftermath of* Lingle v. Norge: *Wholly Independent or Inextricably Intertwined?*, 34 S.D. L. REV. 63, 65 (1989) (describing federal labor law preemption as a "legal quagmire").

3. United Steelworkers v. Rawson, 495 U.S. 362 (1990); Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); *see also infra* part IV.

4. 839 P.2d 314 (Wash. 1992).

5. 29 U.S.C.A. §§ 151-169 (West 1982 & Supp. 1993).

6. *See* ROBERT F. KORETZ, STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 1-9, 548-55 (1970); PAUL C. WEILER, GOVERNING THE WORKPLACE 200-01 (1990); ABA SECTION OF

merce from labor disputes by granting federal protection to the right to organize and join labor unions.[7] While the NLRA is not designed to dictate substantive aspects of the bargaining process, it does provide a legal framework for the negotiation of the terms of collective bargaining agreements.[8] As an amendment to the NLRA, the Labor Management Relations Act (LMRA) originally was intended to limit the power of organized labor.[9] For example, the LMRA permits states to prohibit compulsory union membership (so called "closed shops"), and numerous states have enacted "right to work" legislation under section 14(b) of the LMRA.[10]

Section 301 recognizes collective bargaining agreements as enforceable contracts and grants federal district courts original jurisdiction over suits for violations of these agreements.[11] Section 301 states in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[12]

This section also was found to permit suits brought by individual employees.[13]

Yet Congress did not specify the scope of the preemption of state law by federal labor law.[14] Under the Constitution's supremacy clause, federal law trumps when it conflicts with state law.[15] The doctrine of federal law preemption thus is limited to state laws and regulations that conflict with

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LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW 3-30 (Charles J. Morris ed., 1983) (discussing the history of the Wagner Act).

7. ROBERT GORMAN, BASIC TEXT ON LABOR LAW 21 (1976).

8. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952); Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955); *see also* Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

9. *See* KORETZ, *supra* note 6, at 548-55 (explaining that the Act was a direct response to the tremendous growth of union membership and the number of strikes in the 1940's; despite strong opposition by organized labor, the legislation was enacted over President Truman's veto).

10. 29 U.S.C.A. § 143; *see also* GORMAN, *supra* note 7, at 641.

11. 29 U.S.C.A. § 185(a).

12. *Id.*

13. Smith v. Evening News, 371 U.S. 195, 200-01 (1965).

14. *See* Judy Hitchcock, Comment, *State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption*, 71 CAL. L. REV. 942, 951 (1983); Archibald Cox & Marshall J. Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 212 (1950) ("[P]roblems of supremacy and accommodation are essentially issues of legislative policy. . . . Yet it is the practice for Congress to avoid the decision, thus leaving the problems to the Supreme Court. And the Court, paradoxically, then draws the necessary lines by asking—in form if not in actuality—where Congress drew them.").

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

U.S. CONST. art. IV, cl. 2.

federal law and policy.[16] A union employee's suit for enforcement of a state law employment right raises a section 301 preemption question when that state right replicates or involves rights granted under the terms of the collective bargaining agreement. Courts consequently are left to determine the extent to which Congress intended section 301 to supersede state law by analyzing the purpose and structure of the statute.[17]

The tension between section 301 and state law began with the erosion of the traditional employment-at-will rule.[18] During the 1970's, state courts and legislatures began developing safeguards for individual employment rights designed to mitigate the effects of the employment-at-will rule.[19] The first development occurred in the area of unjust dismissal, with some state courts applying tort and contract theories to hold that certain types of dismissal offended public policy or breached an implied term of an employment contract.[20] The rule's demise continued rapidly and, by 1988, courts

16. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955). Section 301 is one of three branches of preemption under federal labor law. The *Garmon* doctrine, another branch of federal labor law preemption, establishes the primary jurisdiction of the National Labor Relations Board (NLRB). San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). In *Garmon*, the Court held that state and federal courts must defer to the NLRB when the claim is actually or arguably subject to section 7 or protected by section 8 of the NLRA, which prohibit unfair labor practices and protect certain concerted activities. *Id.* at 244-45; 29 U.S.C.A. §§ 157, 158; *see also* David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 523-50 (1986) (discussing the *Garmon* doctrine and its exceptions). The *Machinists* branch preempts any attempt by a state to regulate conduct that Congress intentionally left unregulated. Machinists v. Employment Relations Comm'n, 427 U.S. 132 (1976). For a criticism of *Garmon* and *Machinists* preemption of state labor laws, see Eileen Silverstein, *Against Preemption In Labor Law*, 24 CONN. L. REV. 1 (1991). This article addresses only section 301 preemption of state law claims.

17. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1985); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985) (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)) ("[C]ourts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'").

18. The rule that either the employer or employee may terminate an employment relationship upon giving notice developed in the mid-nineteenth century as a rule of evidence. As originally written, the rule placed the burden of proof on the employee to show that the hiring was not at will but for a specified term. H.G. WOOD, MASTER AND SERVANT § 134 (1877). However, it quickly developed into a black letter rule of employment relations: "All may dismiss their employees [sic] at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other ground by* Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915); *see also* C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 (2d ed. 1913). For a detailed discussion of the history of the employment-at-will rule, see David L. Durkin, Comment, *Employment At-Will In The Unionized Setting*, 34 CATH. U. L. REV. 979, 982-85 (1985).

19. *See* HENRY H. PERRITT, JR., EMPLOYMENT DISMISSAL, LAW AND PRACTICE §§ 2.1-2.38 (2d ed. 1987); Joseph R. Weeks, *NLRA Preemption of State Common Law Wrongful Discharge Claims: The Bhopal Brigade Goes Home*, 13 PEPP. L. REV. 607, 607-21 (1986); William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985).

20. *See, e.g.*, Nees v. Hock, 536 P.2d 512, 516 (Or. 1975) (employee fired for serving on a jury); Mongee v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (contract breached when employee was fired for refusing to date her supervisor); Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (employee wrongfully discharged for refusing to perjure himself on

in thirty-two states had adopted public policy exceptions, eleven had applied the covenant of good faith and fair dealing, and twenty-nine had found contractual limitations on the employment-at-will rule in employee handbook language.[21] Today, twenty-two states prohibit termination in retaliation for filing a worker's compensation claim, thirty-four protect whistleblowers, and forty-two states regulate the use of lie-detectors in the workplace.[22] Many states also restrict the use of workplace drug tests.[23] Finally, most states have statutes that in various ways protect employees in the event of a corporate takeover.[24] Many commentators have applauded this demise of the at-will rule.[25] But, while these state-mandated employment rights could act to strengthen unions by providing employment safeguards in addition to those incorporated in collective bargaining agreements, the federal labor system often denies union members the benefit of these rights.[26]

Because section 301 provides for the enforcement of collective bargaining agreements in federal courts, a section 301 preemption question arises each time a union worker brings a lawsuit alleging the violation of a state law employment right that arguably involves the agreement.[27] Although the Supreme Court has addressed this issue in its line of section 301 preemption cases,[28] lower federal courts and state courts have failed to

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behalf of his employer). *Petermann* has been cited as the first case recognizing the wrongful discharge cause of action. *See, e.g.*, Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 723 (1991); Marc D. Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65, 78-80 (1985).

21. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13-14 (1988).

22. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 592 (1992), compiled from *Individual Employment Rights Manual*, 9A Lab. Rel. Rptr. (BNA) 540-92 (1991).

23. Judith M. Janssen, *Substance Abuse Testing and the Workplace: A Private Employer's Perspective*, 12 GEO. MASON U. L. REV. 611, 636-39 (1990).

24. Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 45-47 (1991).

25. *See* Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983). *But see* Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); Richard W. Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U. L.J. 881 (1983); Charles A. Brake Jr., Note, *Limiting the Right to Terminate At Will: Have the Courts Forgotten The Employer?*, 35 VAND. L. REV. 201 (1982).

26. Stone, *supra* note 22, at 576-77.

27. 29 U.S.C.A. § 185(a).

28. United Steelworkers v. Rawson, 495 U.S. 362 (1990); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988); Caterpillar v. Williams, 482 U.S. 386 (1987); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968); Local 174, Teamsters v. Lucas Flour Co., 369 U.S.

develop a uniform rule for the preemption of a union employee's state law claim. Section I of this article discusses the Washington Supreme Court's approach to this question and the two models for section 301 preemption considered in that opinion. Section II examines the section 301 complete preemption doctrine developed by the United States Supreme Court and argues that the doctrine focuses the inquiry on the source of the tort duty rather than on the negotiability of the right or the employer's defenses. Section III discusses the tension between federal labor policy that favors arbitration and the Washington Supreme Court's approach. Finally, Section IV surveys the resolution of claims identical to those brought in *Commodore* by the lower federal courts and state courts: defamation, race discrimination, outrage or intentional infliction of emotional distress and tortious interference with a contractual or business relationship.

II
THE WASHINGTON SUPREME COURT'S BRIGHT LINE TEST

A. Commodore v. University Mechanical Contractors, Inc.[29]

In *Commodore v. University Mechanical Contractors, Inc.*, the Washington Supreme Court held that a union employee's state law claims for defamation, outrage, racial discrimination and tortious interference with a business relationship were not preempted by section 301. Plaintiff Ernest Commodore was employed as a welder by University Mechanical Contractors, Inc. (University) on a job for Boeing.[30] In his complaint, Commodore alleged that during his employment his superintendent, Bernard Spencer, subjected him to a pattern of harassment that included racist remarks and threats.[31] After quitting his position with University, Commodore began working for Wright, Schuchart & Harbor (WSH) at a different job site. At trial, Commodore testified that Spencer repeatedly visited the new site and continued the harassment, encouraged other employees to do the same, and told the WSH general foreman, "I fired him. . . . You should watch him. You will get rid of him too."[32]

Commodore filed suit in King County Superior Court against University and Spencer, alleging defamation, outrage, tortious interference with a

95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

29. 839 P.2d 314 (Wash. 1992).

30. Commodore was a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 32. University and Local 32 were parties to a collective bargaining agreement. The co-defendant, Bernard C. Spencer, was employed by University as a superintendent on the Boeing site. *Id.* at 315.

31. University terminated Commodore during a force reduction in August 1989, but rehired him on the Boeing job in December of that year. Commodore's employment again was terminated in January 1990, and he was rehired the following April. He testified that the harassment escalated during this last period, and he ultimately quit on May 18, 1990. *Id.* at 315-16.

32. WSH management eventually ordered Spencer not to return to the job site. *Id.* at 316.

business relationship and racial discrimination. In response to the defendants' motion to dismiss, the trial court found all of the claims preempted under section 301 and granted summary judgment in favor of the defendants.[33]

On appeal, the Washington Supreme Court reversed the trial court's decision, holding that the claims were not preempted by section 301, and remanded the case for resolution of the state law claims. After briefly reviewing some of the relevant United States Supreme Court decisions, the court quoted the current test for section 301 preemption, as stated in *Lingle v. Norge Division of Magic Chef*: "[A]n application of state law is preempted by section 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement."[34] Citing the difficulty that courts have experienced in applying the test enunciated in *Lingle*,[35] the Washington Supreme Court examined two divergent "models" for using the *Lingle* test: the White Model and the Marcus Model.[36]

B. The Two Models for Section 301 Preemption

Professor White's model determines preemption based on whether or not the employment right at issue is negotiable.[37] White argues that the preemption of state law claims supports labor policies favoring self-government and arbitration, which resolves disputes outside the court system: "[S]uch a policy [does not] necessarily come at the expense of individual rights. Many of the substantive protections afforded by state law claims are duplicative of the protections a collective bargaining agreement affords."[38]

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33. The business manager of Local 32 found no basis for grieving Commodore's claims under the collective bargaining agreement. *Id.* at 316.

34. *Id.* at 317-18, quoting Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 413 (1987) (footnote omitted). For a complete discussion of *Lingle*, see *infra* notes 105-09 and accompanying text.

35. *Commodore*, 839 P.2d at 318:

> *Lingle* establishes a rule for determining whether state law claims of employees governed by a CBA are preempted under section 301 but gives little guidance as to what constitutes a state provided right. As a result, courts are still struggling to ascertain when a claim's resolution actually will involve interpretation or consideration of the CBA, and section 301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*.

36. *Id.* at 318-19. *See* Rebecca Hanner White, *Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377 (1990); *see generally* Marcus, Note, *supra* note 2.

37. White, *supra* note 36, at 416-34.

38. *Id.* at 393. However, section 301 preemption is subject to a relatively short statute of limitation (6 months) and the remedies are limited to those available under contract law or the duty of fair representation. 29 U.S.C.A. § 167; *see* Lorraine Schmall, *Workplace Safety and the Union's Duty After* Lueck *and* Hechler, 38 U. KAN. L. REV. 561, 564 (1990). *See generally* Michael J. Friedman, *Wrestling the Giant Squid: The Independence of the Duty of Fair Representation Claim*, 36 WAYNE L. REV. 1237 (1990). When a claim is preempted by section 301, the employee must rely on arbitration under the collective bargaining agreement for resolution of the grievance. Because the arbitrator interprets and applies the terms of the agreement rather than state law, preemption eliminates the state law right. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

Under Professor White's analysis, a claim based on a negotiable right always would be preempted. In contrast, a claim involving a non-negotiable or non-waivable right, designed to protect the public at large and that does not derive from the labor contract, would be preempted only "if its resolution depend[ed] upon interpretation of the contract, even if that interpretation [was] made necessary by an employer's defense."[39] She bases this conclusion on the following language in *Allis-Chalmers Corp. v. Lueck*:

> [O]ur 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 the contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.[40]

Professor White interprets this language to mean that when the claim implicates a negotiable right the contract must be examined to determine whether that right was waived or altered; since this would involve an interpretation of the contract's terms, the claim is preempted.[41] This analysis would result in the preemption of virtually all state law claims, unless the legislature made it clear that the right was not waivable. In the case of a negotiable right, the employer merely needs to allege in defense that the right was waived; the claim will be preempted without examining whether the allegation of waiver is true.[42] Thus, under Professor White's model, a state law claim is preempted on the mere possibility that it may have been waived, not because it actually was waived. An employee thus is denied the protections of the state law, which would have been available absent union representation, merely because the union *might* have waived the state law right.[43] Although no federal labor law policy requires this perverse Catch-22 result, this has been the outcome in several cases.[44]

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39. *Id.* at 416. A negotiable claim may be waived or altered by private agreement and generally deals with individual rather than public concerns. *Id.* at 417. Examples of negotiable claims include common law claims such as slander or defamation, intentional infliction of emotional distress or outrage, and claims arising from employee drug testing. *Id.* at 417-23. In contrast, non-negotiable state law claims are generally narrowly-tailored statutory remedies designed to protect the public good or provide a minimum substantive guarantee. *Id.* at 417 n.175; *see also* Yonover, *supra* note 2, at 94. An example would be the claim of retaliatory discharge for filing a worker's compensation claim presented in *Lingle*. The Ninth Circuit defined a non-negotiable right in Miller v. AT&T Network Sys., 850 F.2d 543, 546 (9th Cir. 1988): "A right is nonnegotiable if the state law does not permit it to be waived, alienated, or altered by private agreement."

40. 471 U.S. 202, 213 (1985).

41. White, *supra* note 36, at 397-98.

42. *Id.* at 398.

43. *See* Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers For The Trilogy, Only One For* Lingle *and* Lueck, 66 CHI.-KENT L. REV. 685, 709-10 (1990). White's interpretation of the Court's preemption test (that is, a claim is preempted when interpretation of the agreement is necessary to assess the validity of an employer's defense) is also embraced in Todd Brower, *Towards A Unified Accommodation of State Law and Collective Bargaining Agreements: Federalism, Public Rights and Liberty of Contract*, 26 HOUS. L. REV. 389, 435-36 (1989).

44. Harper, *supra* note 43, at 710-12; *see also* Miller v. AT&T Network Sys., 850 F.2d 543 (9th Cir. 1988); Douglas v. American Info. Technologies Corp., 877 F.2d 565, 572 n.10 (7th Cir. 1989)

The Supreme Court's decision in *Lingle*,[45] however, casts doubts on this approach. In *Lingle*, the Court stated that "[w]hile it may be true that most state laws that are not preempted by section 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpre-emption."[46] Professor White acknowledges that this phrase is potentially troubling for her idea regarding the preemption of all negotiable rights, and at least one court has interpreted this statement as a signal that some negotiable rights may not be preempted.[47] However, White dismisses the language as inconsistent with *Allis-Chalmers* and her analysis of the case, instead interpreting it to express the proposition that non-negotiable rights generally, but not always, will not be preempted.[48] Yet the Court further stated, in its discussion of non-negotiable and negotiable rights, that "a law could cover only unionized workers but remain unpre-empted if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder."[49] This analysis clearly indicates that the negotiability of a claim is not dispositive. Instead, the inquiry focuses on whether an application of the state law right derives from the interpretation of the collective bargaining agreement or whether the duty implicated in the complaint is independent of the contract.[50]

In the second model, Ms. Marcus advocates the adoption of a narrow test for section 301 preemption: a union member's claim should not be preempted if the cause of action does not depend on the existence of a collective bargaining agreement.[51] Marcus defines an "independent" state law claim as one that an employee can assert absent an employment contract and that does not arise from contractual rights, either explicit or implied. Non-negotiable state law rights are independent by definition because they cannot be waived or altered by the collective bargaining agreement. Similarly, a negotiable state law right is independent if it does not arise from the agreement and "only the employer's defense mandates interpreting the CBA."[52] Under this approach, section 301 would preempt only claims for breach of contract, breach of an implied covenant of good faith and fair dealing, and claims based directly on a violation of the collective bargaining agreement.[53] The same rights then would be available to non-union, as

(upholding preemption if right is "arguably sanctioned" by labor agreement); discussion of *Allis-Chalmers*, *infra* note 87 and accompanying text.

45. 486 U.S. 399 (1987).

46. *Id.* at 407 n.7.

47. White, *supra* note 36, at 412 n.158; *see also Miller*, 850 F.2d at 547-48.

48. White, *supra* note 36, at 412 n.158.

49. 486 U.S. at 407 n.7.

50. *Id.* at 413.

51. Marcus, Note, *supra* note 2, at 225.

52. *Id.* at 210 n.13.

53. *Id.* at 225 (for the third claim, she provides the example of an intentional infliction of emotional distress claim supported solely by an allegation that the defendant breached the collective bargaining agreement).

well as union, employees when the cause of action does not depend on the existence of an employment contract.[54] When the employer's defense raises a federal question, the state court can assess the validity of the defense under its concurrent jurisdiction.[55]

C. *The Washington Supreme Court's Application*

The Washington Supreme Court rejected White's model because it broadened the scope of section 301 preemption beyond the intent of *Lingle*.[56] In contrast, the court found Marcus's model to be true to the language of *Lingle*, while also addressing section 301 policy concerns.[57] In addition, the model "provides the desired certainty to parties to a [collective bargaining agreement] because it draws a bright line between those claims which are preempted and those which are not."[58]

The court applied Marcus's model to Commodore's claims, holding that the claims were not preempted under section 301 because they were based on independent state law rights that could have been asserted absent a contract. The claims were based not on a collective bargaining agreement, but rather on a source of legal duty independent of any contract.[59] Commodore's claim for racial discrimination was "based on the independent state law right" codifying anti-discrimination principles "and could have been brought in the absence of a CBA."[60] Similarly, the cause of action for defamation existed "independently of any CBA in the common law of Washington," especially when the alleged defamation was unrelated to an investigation, termination or grievance proceeding.[61]

In response to the defendants' argument that the outrageousness of their conduct depended on the scope of the conduct permissible under the terms of the contract, the court found that resolution of the elements of outrage did not require interpretation of any terms. Furthermore, the tort of outrage arose from a "source of legal duty—Washington tort law—independent of [the] contract."[62] Finally, the claim of tortious interference with a business relationship was not preempted; the elements of the claim did not require the existence of an enforceable contract or the breach of one,

54. *Id.* at 226.

55. *Id.* at 227 (citing Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)).

56. *Commodore*, 839 P.2d at 319.

57. *Id.* at 319 (noting the policies of the uniform application of federal law and the maintenance of certainty in the negotiation, administration and enforcement of collective bargaining agreements). In *Lucas Flour*, the Court discussed the need for a uniform body of federal law regarding the interpretation and enforcement of collective bargaining agreements in order to promote industrial peace and also provide certainty to the parties over the negotiation and administration of labor contracts. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962); *see also infra* notes 71-72 and accompanying text.

58. *Commodore*, 839 P.2d at 319.

59. *Id.* at 320-23.

60. *Id.* at 320.

61. *Id.* at 320-21.

62. *Id.* at 322.

so Commodore could have asserted his claim regardless of the existence of a labor agreement. Moreover, the claim alleged tortious interference with the relationship between Commodore and WSH, and the defendants did not allege that WSH was a party to the collective bargaining agreement.[63] Although the defendants did not file an answer, the court noted that if any defenses raised federal questions, the trial court could evaluate the defenses under its concurrent jurisdiction to interpret collective bargaining agreements.[64] Fear that employers would assert groundless defenses in order to implicate the contract and secure preemption motivated the court to adopt this approach.[65]

Critical of the majority's reasoning, two judges concurred only in the result. They noted that the White model never had been cited by a majority, while Marcus's had been cited only for the proposition that section 301 preemption is a confused area of federal litigation and for the idea that employers might assert invalid defenses to avoid state law.[66] As the concurring opinion stated, "[s]urely there is better authority for a reasoned opinion."[67]

III
THE SUPREME COURT'S SECTION 301 DOCTRINE

Although the Washington Supreme Court's decision in *Commodore* admittedly rests on shaky legal authority, a careful examination of the United States Supreme Court's decisions supports this application of the section 301 preemption test. Rather than examining the negotiability of the state law right or the merits of the defendant's section 301 defense, raised either as a jurisdictional basis for removal or as a substantive defense to a state law claim, the focus of the inquiry should be on whether the duty allegedly violated arises from the terms of a labor contract or from some other independent source such as state law.[68]

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63. *Id.* at 322-23.

64. *Id.* at 323 (citing Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506 (1962)).

65. *Id.* An employer can defend against a variety of state law torts by asserting a legal right to act in the manner challenged. For example, an employer enjoys a qualified privilege against defamation when it serves a legitimate business interest.

66. *Commodore*, 837 P.2d at 323-24 (Brachtenbach, J., concurring) (citing Galvez v. Kuhn, 933 F.2d 733, 776, 780 (8th Cir. 1991); *Singh* v. *Trustees*, 779 F. Supp. 1265, 1268 (D. Haw. 1991); *Smith* v. Colgate-Palmolive Co., 752 F. Supp. 273, 277 (S.D. Ind. 1990)).

67. *Id.* at 324.

68. *See* McCormick v. AT&T Technologies, Inc., 934 F.2d 531, 545 (4th Cir. 1991) (Phillips, J., dissenting), *cert. denied*, 112 S. Ct. 912 (1992); *see also* Harper, *supra* note 43, at 718 ("The appropriate rule for section 301 preemption thus focuses on whether the state law claim is dependent on the existence of a collective agreement, rather than on whether the state law claim requires the interpretation of the agreement.").

A. *The Need for Uniform Federal Law*

Initially, the United States Supreme Court questioned whether section 301 was constitutional because it lacked any substantive law constituting the basis of a federal question for federal jurisdiction purposes.[69] In *Westinghouse*, the Court did not resolve whether section 301 was merely jurisdictional in terms of permitting removal under 28 U.S.C. § 1441 for suits alleging violation of a collective bargaining agreement, or whether it also contained a substantive component.[70] However, in *Textile Workers Union v. Lincoln Mills*,[71] the Court held that section 301 authorized federal courts to develop a uniform body of substantive law for the interpretation and enforcement of collective bargaining agreements.[72] The Court reasoned that a contrary result would undermine the purpose of the LMRA, which was to provide for the judicial enforcement of contracts between employers and unions in order to resolve grievances through arbitration.[73]

In the next important case examining section 301 preemption, *Charles Dowd Box Co. v. Courtney*,[74] the Supreme Court held that state courts have concurrent jurisdiction over section 301 claims. The purpose of section 301 was to promote industrial peace through the collective bargaining process and to encourage labor and management to honor collective bargaining agreements by including federal courts among the judicial fora available to enforce those agreements. The Court reasoned that denying state courts jurisdiction to hear section 301 suits would obviate this purpose. State courts were required, however, to apply federal common law governing the interpretation and enforcement of labor contracts, as well as to participate in the development of this law.[75]

Noting the need for a uniform body of federal law to promote industrial peace, the Court held in *Local 174, Teamsters v. Lucas Flour Co.*[76] that the supremacy clause required the body of federal law developed by state and federal courts to displace any state law regarding the interpretation and enforcement of labor contracts.[77] Otherwise, it reasoned, varying interpretations of the terms of a collective bargaining agreement under state and

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69. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 447-51 (1955).

70. *Id.*

71. 353 U.S. 448 (1957).

72. *Id.* at 456-57.

73. *Id.* at 456.

74. 368 U.S. 502, 507, 513-14 (1962).

75. *Id.* at 508-09.

76. 369 U.S. 95 (1962).

77. *Id.* at 102-04; *see also* U.S. CONST. art. VI, cl. 2:

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

See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 479-511 (2d ed. 1988).

federal law would disrupt the negotiation and administration of labor contracts:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . . [T]he process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.[78]

Despite the straightforward logic supporting the need for a uniform federal law regarding labor contracts, confusion arose when the Court considered the scope of preemption under section 301.

B. The Complete Preemption Doctrine

The Supreme Court next determined, in *Avco Corp. v. Aero Lodge No. 735*,[79] that section 301 preemption could provide the basis for removal jurisdiction under 28 U.S.C. § 1441. In that case, the Court found that section 301 preemption was so expansive that claims based exclusively on state contract law were not only preempted, but also became federal question claims.[80] In response to an employer's claim for breach of a no-strike clause, the union argued in defense that section 301 preempted the state breach of contract action. The Supreme Court held that any state law cause of action for violation of a collective bargaining agreement was entirely displaced by section 301.[81] Under this doctrine of "complete preemption," such claims arose under federal law and thus could be removed to federal courts under section 1441, despite the fact that removal jurisdiction typically is denied when a federal issue, such as section 301 preemption, is raised in defense.[82]

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78. *Lucas Flour*, 369 U.S. at 103-04.

79. 390 U.S. 557 (1968).

80. *Id.* at 560-62.

81. *Id.* (holding that a state law claim of breach of the collective bargaining agreement is wholly a matter of federal law under section 301).

82. *Id.* at 560; *see also* 28 U.S.C.A. § 1441(b) (West 1973 & Supp. 1993) (permitting statutory removal of federal question cases). Note that section 1441(a) permits removal only when a federal court has original jurisdiction and section 1331 grants original federal jurisdiction over claims that raise a federal question. The scope of federal jurisdiction is determined with reference to the well-pleaded complaint rule, which states that when a complaint fails on its face to present a federal issue, a federal defense by itself is insufficient grounds for removal or original federal jurisdiction. *See* Stone, *supra* note 22, at 597 n.83. As stated by the Supreme Court, "[t]he rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

In *Franchise Tax Bd. v. Construction Laborers Vacation Trust*,[83] the Court further defined "complete preemption" when it refused to find removal jurisdiction in a state attachment action where preemption was raised as a defense. The Court distinguished that case from section 301 preemption in its discussion of the *Avco* decision, stating that although a preemption defense did not generally create federal jurisdiction, "the pre-emptive force of § 301 [was] so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'"[84] Under the "complete preemption" doctrine, an independent corollary to the well-pleaded complaint rule, some claims of preemption do give rise to removal jurisdiction when, as with section 301, the federal interest is so strong as to completely supplant the state claim.[85] This doctrine transforms a claim involving interpretation or enforcement of a collective bargaining agreement into a section 301 claim from its inception.[86]

While *Avco* made it clear that state law claims alleging the breach of a collective bargaining agreement were completely preempted under section 301, the issue remained whether section 301 completely preempted any state law claims beyond those that expressly alleged such a breach. This issue was presented in *Allis-Chalmers Corp. v. Lueck*,[87] in which an employee sued his employer under a Wisconsin law defining as a tort the wrongful and bad-faith handling of an insurance claim, after the employer harassed its employee about the claim and directed the insurer to discontinue payments. The employee had qualified for disability benefits under a collective bargaining agreement after suffering a nonoccupational back injury. The Court held the tort claim was preempted under section 301 because resolution of the state-law claim was "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract. . . ."[88]

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83. 463 U.S. 1 (1983).

84. *Id.* at 23 (quoting 29 U.S.C.A. § 185(a)).

85. *Id.* at 22; *see also* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987) (noting that section 301 has "extraordinary pre-emptive power."). As the Court in *Metropolitan* stated:

> One corollary of the well-pleaded complaint rule . . . is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years, this Court has singled out claims preempted by § 301 of the LMRA for such treatment.

Id. at 65.

86. 463 U.S. at 23-24 (citing Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 376 F.2d 337, 339-40 (6th Cir. 1967), *aff'd* 390 U.S. 557 (1968), for the proposition that "if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law"); *see also* Stanley Blumenfeld, Jr., Comment, *Artful Pleading And Removal Jurisdiction: Ferreting Out The True Nature Of A Claim*, 35 UCLA L. REV. 315, 349-55 (1987-88) (criticizing Franchise Tax Board decision because the analysis requires a finding of preemption as a precondition of federal jurisdiction, thus necessitating a decision on the merits prior to a finding of jurisdiction).

87. 471 U.S. 202 (1985).

88. *Id.* at 220 (citation omitted).

Reasoning that the contract might contain implied terms that defined the employer's duty to pay insurance benefits, the Supreme Court found the claim was preempted because the "duties imposed and rights established through the state tort thus derive[d] from the rights and obligations established by the contract."[89] The state law right "not only derive[d] from the contract, but [was] defined by the contractual obligation of good faith, [and] any attempt to assess liability here inevitably [would] involve contract interpretation."[90] Limiting complete preemption to formally alleged breach of contract claims would "elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract."[91]

However, not every suit "tangentially" involving a term of a labor contract is preempted by section 301.[92] Instead, the focus of the analysis must be on whether the state claim confers independent, non-negotiable state law rights or whether evaluation of the tort claim is "inextricably intertwined with consideration of the terms of the labor contract."[93] In *Allis-Chalmers*, even though the complaint was pled as a state law tort claim, evaluation of that claim was "inextricably intertwined" with the agreement because the employer's duty originated in the agreement, which provided the benefits and prescribed the claims process.[94]

In a straightforward application of the *Allis-Chalmers* analysis, the Court held in *International Bhd. of Elec. Workers v. Hechler*[95] that a state law claim of negligence against a union for failure to provide a safe workplace was preempted by section 301. Section 301 governs claims founded directly on rights created by a collective bargaining agreement and claims "substantially dependent on analysis of a collective-bargaining agreement."[96] The duty relied on by the plaintiff did not exist independently of the labor contract, but rather allegedly was created by the collective bargaining agreement.[97] Resolution of the tort claim required the court to "ascertain, first, whether the collective-bargaining agreement in fact placed an

89. *Id.* at 217.
90. *Id.* at 218.
91. *Id.* at 211.
92. *Id.*
93. *Id.* at 213.
94. *Id.* at 217-18. *Allis-Chalmers* has been interpreted as finding preempted any claim based on a state law that may be waived in a collective bargaining agreement. *See supra* notes 37-43 and accompanying text; Anthony Herman, *Wrongful Discharge Actions After* Lueck *and* Metropolitan Life Insurance: *The Erosion of Individual Rights and Collective Strength?*, 9 INDUS. REL. L.J. 596, 634 (1987). Yet *Allis-Chalmers* merely states that state law rights that can be waived must be preempted if the rights do not exist "independent of any right established by contract . . . ." 471 U.S. at 213. Hence, the negotiability of the state law right is not the controlling factor in section 301 analysis. Instead, the inquiry examines whether the right is independent of the contract, meaning that the tort duty is created by state law rather than the labor contract.
95. 481 U.S. 851, 856-59 (1987).
96. *Id.* at 859 n.3 (quoting *Allis-Chalmers*, 471 U.S. at 220).
97. *Hechler*, 481 U.S. at 859-61.

implied duty of care on the Union . . . , and second, the nature and scope of that duty. . . ."[98] Because the complaint expressly alleged that the duty to provide a safe workplace derived from the agreement, the claim was preempted: it arose exclusively from contracts and agreements between the union and the employer.[99] The Court's analysis in *Hechler* makes it clear that resolution of the section 301 preemption issue depends on the source of the allegedly violated duty.

Confusion over the scope of the "complete preemption" doctrine arose in the Court's next decision, *Caterpillar, Inc. v. Williams*,[100] which held that a claim for breach of an individual employment contract was not completely preempted under section 301. In that case, a group of employees claimed that their employer had breached individual contracts signed prior to their joining the union. The employer sought removal by arguing in defense that the collective bargaining agreement included a waiver of any preexisting individual contract rights. Finding that the defense raised a federal question, the district court granted removal jurisdiction and dismissed the claim as a section 301 action for failure to exhaust the contractual remedies.[101]

Affirming the Ninth Circuit's reversal, the Supreme Court held that the claim did not arise under section 301 because the complaint did not rely upon the bargaining contract and the asserted rights did not require interpretation of that agreement. As pleaded, the claims were not "substantially dependent" upon interpretation of the collective bargaining agreement; rather, the allegedly violated rights arose under the individual contracts.[102] Therefore, the federal courts did not have removal jurisdiction.[103] The Court noted that "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement."[104] In addition, the Court explicitly rejected the employer's attempt to create a basis for complete preemption by raising the collective bargaining agreement as a defense: "[A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated."[105] Because of the policies underlying the well-pleaded complaint rule, removal should be denied whenever federal questions are presented only in

98. *Id.* at 862.
99. *Id.* at 859.
100. 482 U.S. 386, 394 (1987).
101. *Id.* at 390.
102. *Id.* at 394 (quoting *Hechler*, 481 U.S. at 859 n.3).
103. *Williams*, 482 U.S. at 391.
104. *Id.* at 396 (emphasis in original).
105. *Id.* at 399 (emphasis in original).

defense.[106] The federal defense based on the collective bargaining agreement could be considered by the state court upon remand, and for that limited purpose the state court might interpret the agreement by applying federal law.[107]

Confusion over the scope of complete preemption arose because the Court's decisions were ambiguous where the employer raised a defense of an implied term or waiver in the collective bargaining agreement. In *Williams* the employer's defense was rejected, while in *Allis-Chalmers* the claim was preempted based on the argument that the agreement contained implied terms that limited the employer's obligation to pay medical insurance. While these two cases are not easily reconciled, some courts attempted to do so under the theory of partial preemption, reasoning that not all cases preempted under section 301 were also subject to removal jurisdiction.[108] These courts interpreted *Williams* as addressing only the issue of removal jurisdiction, "not the substantive merits of a pre-emption defense."[109] However, most courts and commentators have rejected this theory, instead interpreting *Williams* as restricting substantive preemption under section 301, as well as removal jurisdiction under section 1441, when an employer raises a defense based on the collective bargaining agreement.[110] Therefore, a state court action cannot be removed solely on the

106. *Id.* at 398-99 (noting the following policies: the plaintiff is the master of the complaint, a federal question must appear on the face of the complaint and the plaintiff may choose a state forum for the cause of action by eschewing claims based on federal law).

107. *Id.* at 398.

108. *See* 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, 305 (1988) (noting the difficulty in reconciling the two cases); Adkins v. General Motors Corp., 946 F.2d 1201, 1207-08 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1936 (1992); Schacht v. Caterpillar, Inc., 571 N.E.2d 1215, 1218 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 134 (Ill. 1991), *cert. denied*, 112 S. Ct. 1306 (1992).

109. *Schacht*, 571 N.E.2d at 1217. The "artful pleading" doctrine permits removal and denies a plaintiff the choice of a state forum when the claim asserted is essentially federal. *See* 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722, 266-70 (2d ed. 1985); Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 758 (2d Cir.), *cert. denied*, 107 S. Ct. 277 (1986) ("[A] plaintiff may not defeat removal by clothing a federal claim in state garb . . . . "); Treadaway v. Academy of Motion Picture Arts & Sciences, 783 F.2d 1418, 1421 n.3 (9th Cir. 1986) ("The 'artful pleading' doctrine has been developed in the context of removal jurisdiction to prevent plaintiffs from foreclosing defendants' rightful access to federal fora by framing their complaints in an artificial and deceptive manner."); *see also* Blumenfeld, Comment, *supra* note 86, at 321 (arguing for abandonment of the "artful pleading" doctrine).

110. *See* Stone, *supra* note 22, at 602 n.107 (citing McCormick v. AT&T Technologies, 934 F.2d 531, 534 (4th Cir. 1991) (standard for section 301 preemption and removal are the same); Berda v. CBS, Inc., 881 F.2d 20, 23-24, 26 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 879 (1990); Schwartz & Parrot, *supra* note 108, at 305 ("[*Williams*] made it clear that defensive federalization of a claim is no longer permitted."). *But see* White, *supra* note 36, at 408-09 (distinguishing "complete" preemption that will support removal jurisdiction from "ordinary" preemption that will not permit removal, but will displace state law).

"Ordinary" preemption can be distinguished from "complete" preemption. While voiding otherwise applicable state law, the former will not support removal unless the complaint raises a federal question. In contrast, "complete" preemption recharacterizes a facially valid state claim as a federal question claim that is removable. Eric J. Moss, Note, *The Breadth of Complete Preemption: Limiting*

basis of a federal question defense raised by an employer. The "complete pre-emption corollary to the well-pleaded complaint rule" establishes that, if a collective bargaining clause forms the basis for the complaint, the claim is "purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301," and thus can be removed and ultimately preempted.[111] But a claim that relies solely on a duty created by a source independent of the collective bargaining agreement, such as state tort law or an individual contract, will not be preempted, even when the employer raises a section 301 federal question in its defense.

C. The "Independent" Tort Duty

In an effort to eliminate the confusion in the lower courts over the scope of section 301 preemption, the Supreme Court again considered the complete preemption issue in *Lingle v. Norge Div. of Magic Chef.*[112] In that case, after notifying her employer that she had been injured on the job and requesting worker's compensation, the plaintiff was discharged for submitting a false worker's compensation claim and filed a state law tort claim of retaliatory discharge. The Seventh Circuit affirmed the district court's finding of preemption,[113] holding that the state tort of retaliatory discharge was "inextricably intertwined" with the collective bargaining agreement because "it implicate[d] the same analysis of the facts as would an inquiry under the just cause provisions of the agreement."[114]

The Supreme Court reversed, holding that the issue of whether the discharge was retaliatory required only factual inquiries regarding the employer's motivation, and did not depend on interpretation of the collective bargaining agreement. The state action was considered "independent" for purposes of section 301 preemption, despite the employer's assertion that the non-retaliatory reason for the discharge was covered by the contract's "good cause" provision.[115] The Court also rejected the Seventh Circuit's reliance on the parallelism between the facts considered in the state claim and the grievance procedure. That similarity did not negate the "indepen-

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the Doctrine to Its Roots, 76 VA. L. REV. 1601, 1611-14 (1990). Section 301 presents a complete preemption situation. "Ordinary" preemption is the typical problem presented when state and federal law conflict. This is distinct from "partial" preemption, in which a minority view finds that removal jurisdiction does not exist even though the substantive claim is preempted.

111. *Williams*, 482 U.S. at 393-94 (quoting Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983)). For a detailed discussion of the complete preemption doctrine, see generally Note, *supra* note 103.

112. 486 U.S. 399 (1988).

113. Lingle v. Norge Div. of Magic Chef, 823 F.2d 1031 (7th Cir. 1987), *rev'd* 486 U.S. 399 (1988).

114. *Id.* at 1046.

115. *Lingle*, 486 U.S. at 409-10. *But see* Susan Fitzgibbon Kinyon & Joseph Rohlik, *Deflouring* Lucas *Through Labored Characterizations: Tort Actions of Unionized Employees*, 30 ST. LOUIS U. L.J. 1, 5 (1986) (arguing that state tort actions are conceptually disputes arising from employment relationships covered by collective bargaining agreements and arbitration clauses).

dence" of the state claim; "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes."[116] Any unresolved issues requiring interpretation of the contract could be determined by the state court applying federal law, without upsetting the underlying state law claim. As the Court concluded, "an application of state law is pre-empted by § 301 . . . only if such application requires the interpretation of a collective-bargaining agreement."[117]

In the difficult case of *United Steelworkers v. Rawson*,[118] the Supreme Court once again focused its inquiry on whether the duty allegedly violated derived from the collective bargaining agreement or from an independent source of state tort law. In *Rawson*, survivors of miners killed in a mine fire claimed that the union negligently undertook safety inspections of the mine. The Supreme Court reversed the Idaho Supreme Court's decision that a state wrongful death claim against the union was not preempted by section 301.[119] The Idaho Supreme Court had held that the terms of the collective bargaining agreement required no interpretation; "rather the provisions determine only the nature and scope of the Union's duty."[120] Therefore, according to the state court, the terms of the agreement were not "inextricably intertwined" with the state law claim. By undertaking safety inspections in the mine, the union had assumed an extra-contractual duty based on general tort principles, rather than a duty defined by the terms of the agreement.[121]

A majority of the Supreme Court disagreed and held that the claim was preempted. It concluded that the union's conduct could be measured only in terms of the collective bargaining agreement and thus was not independent of the contract.[122] The majority concluded that the safety inspections were undertaken only pursuant to the authority granted by the agreement: "the duty on which respondents relied as the basis of their tort suit was one allegedly assumed by the Union in the collective-bargaining agreement."[123] The dissent argued that the majority should defer to the Idaho Supreme Court's finding that the state law elements could be proven without relying on the contract, rather than reinterpret Idaho tort law. As interpreted by the

116. *Lingle*, 486 U.S. at 410 (footnote omitted).

117. *Id.* at 413.

118. 495 U.S. 362 (1990).

119. *Id.* at 368. The plaintiffs also claimed fraud based on alleged representations that the union had special expertise in safety. The Idaho court affirmed the trial court's dismissal of the fraud claim, finding that the record failed to show any evidence that the union made any misrepresentations of fact or intended to defraud the miners, or that the miners relied on the alleged misrepresentations.

120. Rawson v. United Steelworkers, 726 P.2d 742, 751-52 (Idaho 1986).

121. *Id.* at 753.

122. *Rawson*, 495 U.S. at 371.

123. *Id.* at 370.

Idaho Supreme Court, the state law imposed a duty of reasonable care on the union, which applied once the union undertook the safety inspections.[124]

D. *The Applicable Test for Section 301 Preemption*

The Supreme Court's approach to section 301 "complete preemption" focuses on the language of section 301, which authorizes suits in federal court only "for violation of [labor] contracts."[125] Under this approach, section 301 preempts state law claims that expressly allege the violation of a collective bargaining agreement.[126] Beyond an express claim for violation of the contract, section 301 also preempts claims that are determined to be claims for violation of the labor contract in substance though not in form; parties are thereby prevented from "evad[ing] the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract."[127] As the Court explained in *Rawson*, "a state-law tort action against an employer may be pre-empted by § 301 if the duty to the employee . . . is created by a collective-bargaining agreement and without existence independent of the agreement."[128] Plaintiffs are not permitted to avoid federal preemption by pleading their claim as a tort under state law when it actually states a claim for breach of the labor contract.[129] Thus, section 301

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124. *Id.* at 379 (Kennedy, J., dissenting).

125. 29 U.S.C.A. § 185(a).

126. *Avco*, 390 U.S. at 560 (holding that claims alleging the breach of a collective bargaining agreement are completely preempted under section 301).

127. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985); *see also* United Steelworkers v. Rawson, 495 U.S. 362, 369 (1990); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 852-53, 862 (1987); McCormick v. AT&T Technologies, Inc., 934 F.2d 531 (4th Cir. 1991). In *McCormick*, the Fourth Circuit held that wrongful or negligent employer conduct could be determined only in light of the powers granted the employer in the collective bargaining agreement and that, as a result, the employee's state tort law claim was preempted. Under Virginia tort law, the plaintiff had the burden of proving that the employer's conduct was either wrongful or negligent. *Id.* at 535 (holding that the tort of intentional infliction of emotional distress requires proof of outrageous and intolerable conduct; the tort of conversion is the "wrongful exercise . . . of authority . . . over another's goods.") (quoting Buckeye Nat'l Bank v. Huff & Cook, 75 S.E. 769, 772 (1912)). The court reasoned that the employer's duty could be determined only by interpreting the terms of the contract:

> The circumstances that must be considered in examining management's conduct are not merely factual, but contractual. . . . Cleaning out a locker is not a matter of intrinsic moral import but a question of legal authority—whether management had the lawful right to proceed as it did. . . . State tort claims are preempted where reference to a collective bargaining agreement is necessary to determine whether a "duty of care" exists or to define "the nature and scope of that duty . . . ." Whether the actions of management personnel . . . were in any way wrongful simply cannot be determined without examining the collective bargaining agreement . . . .

McCormick, 934 F.2d at 536. In a lengthy dissent, Judge Phillips argued that the correct application of the section 301 preemption doctrine would focus on the location of the tort duty and ignore any defenses. *Id.* at 545 (Phillips, J., dissenting); *see* Stone, *supra* note 22, at 621-22 (noting approach of Judge Phillips in *McCormick* as a narrower alternative, available within existing legal doctrines).

128. 495 U.S. at 369 (citing *Allis-Chalmers*, 471 U.S. at 211).

129. *Allis-Chalmers*, 471 U.S. at 211 ("Any other result would elevate form over substance and allow parties to evade the requirements of section 301 by relabeling their contract claims as claims for tortious breach of contract.").

only preempts claims for violation of a labor contract, either formally or substantively pleaded. In determining whether a claim is one for violation of a labor contract, the preemption inquiry focuses on whether the duty allegedly violated derives from the collective bargaining agreement or an independent source such as state tort law, regardless of whether the test is phrased as "independent," "inextricably intertwined," or "substantially dependent."[130] Claims involving a duty created by the contract consistently have been found preempted.[131] In contrast, claims alleging the violation of a duty created by a source "independent" of the labor contract have not been preempted.[132] A defendant's assertions, whether for removal purposes or as a defense on the merits, that the terms of an agreement provide a defense to a state law claim are irrelevant to the issue of section 301 preemption because they do not relate to the source of the duty inquiry.[133]

Yet both Judge Phillips's dissent in *McCormick v. AT&T* and the Marcus model note that *Lingle* may raise questions regarding this last proposition.[134] In discussing the tort claim, the *Lingle* Court stated that the elements of the claim would not "require[ ] a court to interpret any term of a collective-bargaining agreement," and the "purely factual inquiry" caused by a "nonretaliatory reason for the discharge . . . likewise does not turn on

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130. *Id.* at 213, 220.

131. *See Rawson*, 495 U.S. at 368; *Hechler*, 481 U.S. 851; *Allis-Chalmers*, 471 U.S. at 220.

132. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988); Caterpillar Inc. v. Williams, 482 U.S. 386, 394 (1987).

133. *McCormick*, 934 F.2d at 543 (Phillips, J., dissenting) (citing *Williams*, 482 U.S. at 398-99).

134. *McCormick*, 934 F.2d at 543-44 (Phillips, J., dissenting); Marcus, Note, *supra* note 2, at 226-27. Both Judge Phillips and Ms. Marcus interpret this language as dictum. *McCormick*, 934 F.2d at 544 (Phillips, J., dissenting); Marcus, Note, *supra* note 2, at 210 n.11. Ms. Marcus's proposed test would eliminate this section of the footnote to prevent further confusion over the preemptive scope of section 301. *Id.* at 22. Some courts have interpreted *Lingle* as suggesting that section 301 preempts a state law claim when the employer raises a defense based on the collective bargaining agreement, although this issue was not directly addressed in the case. *See* Hanks v. General Motors Corp., 859 F.2d 67, 70 (8th Cir. 1988):

> *Lingle* makes . . . plain that the defenses as well as the claims, must be considered in determining whether resolution of the state law claims requires construing the collective bargaining agreement. The factual background of the entire case must be examined against an analysis of the state tort claim and a determination made whether the provisions of the collective bargaining agreement come into play.

If an employer's assertion of a contractual defense by an employer does result in preemption, then more state law claims brought by union workers are likely to be preempted after *Lingle*. Committee on Labor Arbitration and the Law of Collective Bargaining Agreements, *Labor Arbitration and the Law of Collective Bargaining*, 7 LAB. LAW. 747, 755-61 (1991) (noting that the trend following *Lingle* was toward more section 301 preemption). However, other commentators have argued that *Lingle* limited the preemptive scope of section 301 and enabled union workers to assert claims of violations of their state law rights. Robert P. Lane, Jr., Note, *Labor Law Preemption Under Section 301: New Rules for an Old Game*, 40 SYRACUSE L. REV. 1279, 1291-93 (1989) (*Lingle* test limited the preemptive scope of *Allis-Chalmers*); John E. Gardner, Note, *Federal Labor Law Preemption of State Wrongful Discharge Claims*, 58 U. CIN. L. REV. 491, 526-27 (1989) (*Lingle* opened door to union employees' claims for violations of state law rights).

the meaning of any provision of a collective-bargaining agreement."[135] In an accompanying footnote, the Court stated:

> While it may by 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 its application. Such a remedy would be pre-empted by § 301.[136]

While this section could be interpreted as requiring the preemption of a claim when an employer's defense implicates the labor contract, the *Williams* decision clearly rejects such an interpretation. In fact, *Lingle* expressly endorses the reasoning of *Williams*, which held a claim was not preempted because a federal waiver defense did not transform it into one arising under federal law.[137] Moreover, none of the Supreme Court decisions can be construed as endorsing the preemption of a claim when the employer's defense requires the interpretation of a collective bargaining agreement.

Under this approach, the state court would not be deprived of jurisdiction when the employer's defense requires interpretation of the contract. Instead, a state court could assess the validity of the employer's defense under its concurrent jurisdiction by applying federal law.[138] This application of the section 301 preemption doctrine would fulfill the twin goals of permitting union employees to avail themselves of the safeguards created by state law, while at the same time preventing employees from asserting claims for breach of a labor contract, explicitly or otherwise.

IV
SECTION 301 AND THE ROLE OF ARBITRATION

Because courts endorse a strong presumption in favor of grievance and arbitration procedures,[139] the Washington Supreme Court's application of the section 301 preemption doctrine creates a potential conflict by providing union employees greater access to the judicial system to resolve their disputes.[140] As the Court noted in *Allis-Chalmers*,[141] preserving the effec-

135. *Lingle*, 486 U.S. at 407.

136. *Id.* at 407 n.7. The Court provided no example of such a remedy.

137. *Id.* at 410 n.10; *Williams*, 482 U.S. at 398-99.

138. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506 (1962); *see also Lingle*, 486 U.S. at 413 n.12:

> Thus, 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.

139. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

140. Although this may explain why courts rarely preempt claims that are not cognizable under such procedures, courts should instead focus on the relationship between the claim and the collective

tiveness of the arbitration process is "central" to the section 301 doctrine.[142] However, arbitration is not an exclusive remedy, and the policies encouraging the arbitration of disputes should not prohibit a union employee from asserting claims based on state law rights which are available to non-union workers.

Section 301 preemption of a union employee's claim has two significant results. First, when a claim is preempted by section 301, the employee must rely on the collective bargaining agreement's arbitration clause for resolution of the grievance.[143] In *Republic Steel*, the Supreme Court held that parties to a collective bargaining agreement must first exhaust grievance-arbitration procedures provided for under the agreement before bringing a section 301 action in federal court.[144] The Court further stated: "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes . . . ."[145] Second, preemption extinguishes the state right because the arbitrator interprets and applies the terms of the collective bargaining agreement rather than the state law.[146] The preemption of a claim thus deprives the union member of the employment rights created by the state.

Traditionally, union members have favored and relied upon the arbitration process established by collective bargaining agreements and the federal courts for redress of their employment grievances.[147] But one problem with this tradition is the limited review available from the courts. More than thirty years ago, the Supreme Court adopted a very narrow standard for judicial review of arbitration decisions.[148] Because of this narrow standard,

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bargaining agreement, rather than addressing whether the claim can be remedied by a different forum. Stone, *supra* note 22, at 610-11.

141. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

142. *Id.* at 219.

143. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

144. *Id.* at 652-53.

145. *Id.* at 653; *see also* 29 U.S.C.A. § 173(d) ("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.").

146. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960); *see also* Harry T. Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65, 90-91 (1977); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557 (1967); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137, 1140-43 (1977); Stone, *supra* note 22, at 595. A minority view argues that the arbitrator should consider law outside the agreement. *See, e.g.*, Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 270-71 (1989).

147. Angel Gomez III, *Preemption and Preclusion of Employee Common Law Rights by Federal and State Statutes*, 11 INDUS. REL. L.J. 45, 46-47 (1989); White, *supra* note 36, at 390-92.

148. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("[C]ourts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."); *see also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (stating that an arbitration award will be upheld "so long as it draws its essence from the collective bargaining agreement"); United Steelworkers v. American

judicial review of an arbitrator's decision is virtually nonexistent.[149] However, the promotion of arbitration in the Steelworkers Trilogy did not support the idea of an exclusive arbitration remedy for union employees. While the Trilogy did establish presumptions regarding the parties' intent,[150] the parties need not include an arbitration clause providing for an exclusive remedy. Instead, arbitration was envisioned as a response to the disruptions caused by strikes, rather than a means of avoiding judicial application of state law employment rights.[151] Although some courts have argued in favor of section 301 preemption that Congress "envisioned" arbitration to be an "exclusive" process,[152] this argument is not persuasive. While Congress and the Supreme Court have endorsed policies encouraging arbitration, the Supreme Court's section 301 analysis has focused on the development of a uniform body of law to interpret collective bargaining agreements. However, the 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.[153] This argument also fails in the face of Congress' decision not to deny union employees the protections provided by federal employment rights laws.[154] In addition, the language and legislative history of the Taft-Hartley Act[155] does not support the contention that arbitration is always an exclusive rem-

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Mfg. Co., 363 U.S. 564, 569 (1960) (holding that it was not the function of the courts to consider "the meaning, interpretation, [or] application" of a collective bargaining agreement when the contract called for resolution by an arbitrator).

149. Peter Feuille & Michael LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 ARB. J. 35, 40-45 (1990).

150. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83 (holding that collective bargaining agreements containing grievance procedures carry a presumption of arbitrability).

151. Harper, *supra* note 40, at 703.

152. *See Lingle*, 823 F.2d at 1046-47. The Seventh Circuit declared that preemption was required in order to protect the arbitration process from evisceration by the courts and to avoid a decline in the use of arbitration.

153. *See* Reginald Alleyne, *Delawyering Labor Arbitration*, 50 OHIO ST. L.J. 93, 102-03 (1989).

154. Harper, *supra* note 43, at 702-03; *see* Alexander v. Gardner-Denver, 415 U.S. 36, 47 (1974) (holding employee's statutory right to trial under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of the claim to arbitration under the collective bargaining agreement's nondiscrimination clause); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 745 (1981) (finding wage claims under the Fair Labor Standards Act not barred by prior submission of the claim to the grievance procedures under the collective bargaining agreement); McDonald v. City of W. Branch, 466 U.S. 284, 292 (1984) (holding a section 1983 action not barred by a prior arbitration award under the principles of res judicata or collateral estoppel); Atchinson, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 565 (1987) (finding fact that a claim otherwise compensable under the Federal Employer's Liability Act (FELA), 45 U.S.C.A. §§ 51-60 (West 1986 & Supp. 1993), was caused by conduct arguably subject to arbitration under the Railway Labor Act (RLA), 45 U.S.C.A. §§ 151-163, 181-188 (West 1986 & Supp. 1993), does not deprive an employee of the right to bring an FELA action for damages. The RLA does not provide an exclusive remedy for an injury caused by a condition that can be the subject of a grievance under the RLA).

155. 29 U.S.C.A. § 173(d).

edy.[156] Section 203(d) of the Taft-Hartley Act states that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[157] Congress clearly did not intend arbitration to be the exclusive remedy available for the settlement of all employment disputes.

In *Lingle*, the Supreme Court struggled to reconcile the tension between federal labor policies favoring arbitration and the analytical framework for section 301 preemption. The Court first emphasized the importance of the arbitration process, noting the requirement that "the interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements."[158] Yet the Court also noted in *Lingle* that the availability of arbitration does not bar individual employees from bringing claims under federal statutes.[159] Although it emphasized the strong policies encouraging arbitration, the Court also stated that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[160] A state court would be permitted to interpret the agreement when the duty allegedly violated does not derive from the agreement; in such a case, the provision of the agreement would be involved only tangentially with the resolution of the dispute and the claim would not be preempted by section 301.[161] The *Williams* decision also supports the proposition that a state court can examine the agreement to determine the validity of the employer's waiver defense without dismissing the claim for failing to exhaust the arbitration process.[162]

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156. James E. Pfander, *Federal Jurisdiction Over Union Constitutions After* Woodell, 37 VILL. L. REV. 443, 471-72 n.75 (1992); Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 299 (1960-61).

157. 29 U.S.C.A. § 173(d).

158. 486 U.S. 399, 411 (1988) (footnote omitted).

159. *Id.* at 159.

160. *Id.* at 412 (quoting *Buell*, 480 U.S. at 564-65); *see* Lane, Note, *supra* note 134, at 1292 (arguing that *Lingle* is a departure from prior cases, which emphasized the policies favoring the collective bargaining process and arbitration to ensure that state employment protections were available to union as well as non-union workers); Harper, *supra* note 43, at 689 (arguing that the test articulated in *Allis-Chalmers* and *Lingle* does not adequately explain why the need for uniform federal law governing the interpretation of collective bargaining agreements or protection of the arbitration process requires preemption of state employment actions).

161. *Lingle*, 486 U.S. at 413 n.12 (quoting *Allis-Chalmers*, 471 U.S. at 211 ("'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . .'")).

162. 482 U.S. at 398-99 ("It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives."). *But see* White, *supra* note 36, at 409 n.140 (dismissing this language as "dicta").

By limiting the federal policy favoring the arbitration of labor disputes, the Supreme Court has made it clear that arbitration is not an exclusive remedy. In *Alexander v. Gardner-Denver*,[163] although the collective bargaining agreement contained a specific prohibition against racial discrimination, the Court held that prior submission of the claim to final arbitration did not foreclose the employee's right to bring a separate action under Title VII.[164] The Court stated that the Title VII rights were distinctly separate from the contractual rights, even though both resulted from the same factual occurrence.[165] In addition, the Court declared that despite the favored state of arbitration, the arbitrator had neither the authority nor the expertise to hear the Title VII claim because "the competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[166] However, the Court noted that any "arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate," and "[w]here an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight."[167] The Supreme Court perceived no tension in protecting the arbitration process while enforcing minimum employment safeguards for union employees.[168] It concluded that, while the duplicative remedies would increase costs for the employer, the exchange of a no-strike pledge for arbitration would induce the parties to agree to a grievance procedure, while the speed and low cost of arbitration would attract employees.[169]

Similarly, in a decision that did not involve section 301,[170] the Court determined that the policies favoring arbitration did not require the abrogation of state employment rights. Instead, the Court held that a state could mandate "minimal substantive requirements on contract terms negotiated

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163. 415 U.S. 36 (1974).

164. *Id.* at 59-60:

> We think therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII.

Id. at 59.

165. *Id.* at 48-50.

166. *Id.* at 57.

167. *Id.* at 60 & n.21.

168. *Id.* at 53-54 ("Thus the arbitrator has authority to resolve only questions of contractual rights and this authority remains regardless of whether certain contractual rights are similar to, or duplications of, the substantial rights secured by Title VII."); *see also* Harper, *supra* note 43, at 687. Although *Gardner-Denver* left open the issue when state law conflicts with federal law, the analysis also is applied to claims based on state law. *See Lingle*, 486 U.S. at 409-10 (Lingle's state law claim for retaliatory discharge was arbitrated under the just cause provision of her collective bargaining agreement, and she received reinstatement and back pay; the parallelism between the claims did not cause the state claim to be preempted); *see also* Herman, *supra* note 94, at 612 ("The Court . . . reasoned that Congress intended Title VII to 'supplement rather than supplant, existing laws and institutions relating to employment discrimination.'") (quoting *Alexander*, 415 U.S. at 52); Yonover, *supra* note 2, at 80-81.

169. *Alexander*, 415 U.S. at 54-55.

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

between parties to labor agreements."[171] The Court further stated that it could "see no reason to believe that . . . Congress intended state minimum labor standards to be treated differently from minimum federal standards."[172] A different result would "penalize[ ] workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers."[173]

In addition, it considered that the ability of unions to encourage collective actions would not be impaired by permitting union employees to avail themselves of state law remedies. Rather, denying union workers these state employment rights under section 301 would discourage union organizing activities since non-union workers still would be protected by state laws.[174] Although use of the arbitration process may be reduced by state law alternatives, union employees still would prefer arbitration in many instances, due to the speed of obtaining a remedy, the possibility of reinstatement, ease of proof and limited expense.[175]

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171. *Id.* at 754.

172. *Id.* at 755.

173. *Id.* at 756.

174. *See* Herman, *supra* note 94, at 647-50 & n.263; Harper, *supra* note 43, at 703-04. In fact, during the period when state legislatures and courts created these individual employment rights, union membership declined from about 25% of the nonagricultural workforce to less than 17%. *See* Stone, *supra* note 22, at 643; Leo Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL'Y 583, 607 (1990) ("During the 1980's . . . , private-sector unions experienced one of their most severe drops in membership . . . ."). For a discussion of various reasons for the decline, see generally Charles McDonald, *U.S. Union Membership in Future Decades: A Trade Unionist's Perspective*, 31 INDUS. REL. 13 (1992); Robert J. Flanagan, *NLRA Litigation and Union Representation*, 38 STAN. L. REV. 957, 981-83 (1986); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983); Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 645 (1985); *see also* Jane Byeff Korn, *Collective Right and Individual Remedies: Rebalancing the Balance After* Lingle v. Norge Division of Magic Chef, Inc., 41 HASTINGS L.J. 1149, 1151 (1990) (suggesting that judicial recognition of wrongful termination actions by at-will employees has contributed to the demise of unionization).

175. *See* Herman, *supra* note 94, at 653-54; Yonover, *supra* note 2, at 92-93; Court Hearing of the Presidential Advisory Committee on Mediation and Conciliation, Daily Lab. Rep. (BNA) No. 93, at A-10 (May 14, 1986) ("The time between request for a panel and an award averages 200 days with AAA and 260 days with FMCS," and arbitrator costs average $1200); CHARLES S. LA CUGNA, AN INTRODUCTION TO LABOR ARBITRATION 68-70 (1988) (costs of arbitration generally are divided between the union and the employer, with the employee paying nothing beyond union dues); JAMES DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 24 (1988) (litigating a wrongful termination claim averages about three years, and costs average approximately $80,000 in attorney's fees and expenses); *see also* Alexander v. Gardner-Denver, 415 U.S. 36, 55 (1974):

> 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 strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

Some commentators have argued that lack of preemption will undermine the arbitration process, weaken the union's bargaining position and expose employers to the expense of litigating claims in multiple forums.[176] These arguments regarding the negative consequences of dual remedies were rejected by the Supreme Court in *Gardner-Denver* in the context of Title VII and arbitration.[177] Yet permitting union employees to pursue their claims in court, as well as through the grievance procedure, does create the problem of increased costs for employers who face the possibility of litigation in multiple forums. In order to limit their potential exposure to the large damage awards available and often granted for violations of state rights, employers should carefully draft grievance procedure provisions in labor contracts.[178] Although this would not eliminate damage claims for non-negotiable rights that raise a public policy concern, it would restrict employees to the grievance procedure for other alleged violations or even eliminate the state right completely.

In some instances, arbitration has failed adequately to protect bargained-for employment rights.[179] One problem with arbitration is the lack of the full panoply of due process protections provided in a judicial fo-

176. Raymond L. Wheeler & Kingsley R. Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1, 30-32 (1986) ("Continued erosion of the principle of exclusivity of arbitration can only have the effect of consigning arbitration to the status of a second-rate and disfavored method of dispute resolution."); Weeks, *supra* note 19, at 690 (arguing that "wholesale preemption" is required); *see also* Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Respondent, Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988):

> [E]mployers will be routinely required to litigate employee discharge claims in multiple forums. Such multiple forum litigation may well force employers to dispense with the forum they can avoid—arbitration—even though arbitral procedures provide the quickest, easiest and least expensive method of fairly adjudicating employee's discharge claims. This, in turn, ultimately would operate to the detriment of the system of labor-management relations that has served employers and employees well in the over fifty years since the National Labor Relations Act was passed.

Id. at 2-3.

177. *Gardner-Denver*, 415 U.S. at 54-55; *see also* Herman, *supra* note 94, at 614 n.80 (pointing out that following *Gardner-Denver*, the number of agreements containing arbitration clauses has increased from 94% to 97%).

178. For example, an employer could include the following provision in the collective bargaining agreement:

> Any matter governed by or a subject of this Agreement, explicitly or implicitly, constitutes a grievance under this Agreement and is subject to the Arbitration terms of the Agreement. Such matters are within the exclusive jurisdiction of the Arbitrator and may not be the subject of any claim or cause of action in any other forum. The Arbitrator's decision will be final and binding on the parties and those they represent. This provision is designed to cover any dispute that may arise as the result of the employment relationship and encompasses any and all potential causes of action that may arise out of that relationship.

179. *See* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1529-30 (1981); James B. Atleson, *Management Prerogatives, Plant Closings, and the NLRA*, 11 N.Y.U. REV. L. & SOC. CHANGE 83, 93-96 (1982-83) (explaining how the "mandatory/permissive" line and the "factual/legal" distinction substantively affect the bargaining process and represent hidden value choices).

rum.[180] Arbitration remedies, usually reinstatement and back pay, are also not very effective in remedying some employment disputes. For example, reinstatement is often not a viable solution where there is a claim of sexual harassment.[181] Also, from the plaintiff's perspective, arbitration awards are not as generous. For example, the average back pay award by the NLRB for an unfair labor practice was $2,000 in 1980.[182] In contrast, between 1982 and 1986, California employees won over seventy percent of wrongful dismissal cases tried before a jury, with an average award of $652,100.[183] While these figures explain why employers prefer the arbitration process and the broad preemption doctrine developed in the lower federal courts, state employment laws provide several distinct advantages for employees, including the right to a jury trial, punitive and emotional distress damages, and a longer statute of limitations.[184]

Despite the federal labor policy goal of promoting arbitration as a means to remedy employment disputes, arbitration is not the exclusive remedy available to union employees covered by a grievance procedure. State employment laws provide the union employee with additional rights and with access to an alternative forum. While arbitration is still an attractive method for settling many employment disputes because of its low cost, the speed of recovery, and possibility of reinstatement (an employer is especially attracted to the lower damage awards and limited costs of litigating only in one forum), an employee should be permitted to bring a state law claim if the allegedly violated duty is independent of the collective bargaining agreement.

V
SECTION 301 IN THE LOWER FEDERAL COURTS AND STATE COURTS

Despite the Supreme Court's efforts to eliminate the confusion and conflicting results in the area of section 301 preemption, the lower federal courts and state courts have continued to vary their application of the section 301 "complete preemption" doctrine. This has been particularly true of

180. McDonald v. West Branch, 466 U.S. 284, 291 (1984). For a discussion of arbitration proceedings, see generally FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985); OWEN FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION (2d ed. 1983).

181. *See* Stone, *supra* note 22, at 629-30.

182. ARCHIBALD COX ET AL., LABOR LAW, CASES AND MATERIALS 263 (11th ed. 1991) (average back pay award in 1980).

183. *See* William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 405 (1987-88).

184. Thomas Yamachika, *The Law of Federal "Complete Preemption": A New Brand of Federal-State Conflict*, 41 LAB. L.J. 337, 343 (1990). Section 301 suits must be brought within the six-month statute of limitations, while "[t]he statute of limitations for tort actions is one to three years in most states; and six years for contract claims." Yonover, *supra* note 2, at 78 n.142; *see also* Korn, *supra* note 174, at 1184-95 (advocating that arbitrators be permitted to award punitive damages or that damages be limited in state court actions).

some of the claims raised in *Commodore*: defamation, outrage or intentional infliction of emotional distress, and tortious interference with a contractual or business relationship.

A. The Lower Federal Courts

The clear trend in the lower federal courts is towards expansion of section 301 preemption.[185] For example, the Sixth Circuit recently preempted an employee's claim—although interpretation of the collective bargaining agreement was not necessary—because the court would have been required to "address relationships that ha[d] been created through the collective bargaining process . . . ."[186] In another case, the Ninth Circuit preempted a claim of unlawful drug testing because the drug testing was a working condition, and working conditions generally were covered by the contract.[187] In dictum, the court also said that section 301 would preempt claims regarding any working condition within the scope of collective bargaining.[188] This approach would result in the preemption of virtually all state employment rights claims by union workers. Because of this expansive application of the section 301 preemption doctrine, the lower federal courts effectively have denied union workers many of the safeguards created by state employment laws.[189]

Following *Lingle*, lower federal courts typically have employed two methods of reasoning that favor preemption.[190] The first method finds preemption when an employer raises a defense requiring contract interpretation.[191] As previously noted, however, this approach was expressly rejected in *Williams*.[192] The second method, advocated by Professor White but rejected by the Washington Supreme Court in *Commodore*, finds preemption when the state right is negotiable.[193] In such a case, the claim is preempted because the court would need to interpret the collective bargaining agree-

185. *See* Committee on Labor Arbitration, *supra* note 134, at 755-61; Stone, *supra* note 22, at 605.

186. Jones v. General Motors Corp., 939 F.2d 380, 382 (6th Cir. 1991).

187. Schlacter-Jones v. General Tel., 936 F.2d 435, 440 (9th Cir. 1991).

188. *Id.* at 441.

189. Marcus, Note, *supra* note 2, at 229; Herman, *supra* note 94, at 640.

190. *See* Stone, *supra* note 22, at 695 & n.22.

191. Stone, *supra* note 22, at 605. *See, e.g.*, Jones v. General Motors Corp., 939 F.2d 380, 383 (6th Cir. 1991); Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988) (holding that implied contractual terms preempted claims for violation of state law protecting employees from drug testing); Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 113 (1st Cir. 1988) (finding that union agreement giving employers the right to make "reasonable rules and regulations from time to time" preempted an employee's state law right to be free from drug testing), *cert. denied*, 490 U.S. 1107 (1989).

192. 482 U.S. at 398-99; *see also supra* notes 106-07 and accompanying text.

193. *See supra* notes 37-43 and accompanying text; *see also* Tellez v. Pacific Gas & Elec., 817 F.2d 536, 538 (9th Cir. 1987) (holding claims not preempted because the state right protecting employees from defamation was non-negotiable), *cert. denied*, 484 U.S. 908 (1987); Local No. 57, United Ass'n of Journeymen & Apprentices of Plumbing v. Bechtel Power Corp., 834 F.2d 884, 888-90 (10th Cir. 1987) (finding anti-blacklisting provisions of Utah Constitution not waivable, so claims not preempted), *cert. denied*, 486 U.S. 1055 (1988).

ment to see if the right actually was waived, and courts prefer to leave contract interpretation to arbitrators.[194] Waivable state employment rights thus are automatically preempted under this approach.[195]

Union employees' claims that generally never are preempted are limited to those that directly parallel Supreme Court decisions. For example, claims of discrimination on the basis of race, sex, age or another protected classification are not preempted under the reasoning in *Alexander v. Gardner-Denver.*[196] The Court in *Lingle* also endorsed an exception to section 301 preemption for claims under state anti-discrimination laws.[197] In a similar fashion, claims of retaliatory discharge for filing a worker's compensation claim are not preempted following the *Lingle* decision.[198]

However, certain claims almost always are preempted in the lower federal courts. This is particularly true with wrongful discharge claims.[199] In addition to general claims of wrongful discharge, defamation claims also are routinely preempted.[200] Courts preempt defamation claims because the analysis requires determining whether the statements were privileged under the terms of the contract. However, a state court could determine the validity of this defense under its concurrent jurisdiction,[201] which is the approach adopted by the Washington Supreme Court.

Claims for outrage, also termed intentional infliction of emotional distress ("IIED"), and tortious interference with a business or contractual relationship are not so easily categorized. Circuit courts have reached varying

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194. *See* United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582 (1960) (stating that arbitrators, not courts, should interpret collective bargaining agreements).

195. *See* White, *supra* note 36, at 379.

196. 415 U.S. 36 (1974); *see also* Ackerman v. Western Elec. Co., 860 F.2d 1514, 1517-18 (9th Cir. 1988) (disability discrimination); Cook v. Lindsay Olive Growers, 911 F.2d 233, 238 (9th Cir. 1990) (religious discrimination); Austin v. New England Tel. & Tel. Co., 644 F. Supp. 763, 767 (D. Mass. 1986) (disability discrimination); Scott v. New United Motor Mfg., Inc., 632 F. Supp. 891, 894-95 (N.D. Cal. 1986) (race discrimination); Peoples v. Pennsylvania Power & Light Co., 638 F. Supp. 402, 408 (M.D. Pa. 1985) (race discrimination).

197. 486 U.S. at 412-13; *see also* Carrington v. RCA Global Communications, Inc., 762 F. Supp. 632, 641 (D.N.J. 1991) ("Following *Lingle*, courts have uniformly held that state anti-discrimination laws are not preempted by § 301 of the LMRA . . . even where the labor contract itself prohibits discrimination.").

198. *See, e.g.*, Eldridge v. Felec Servs., Inc., 920 F.2d 1434, 1438-39 (9th Cir. 1990); Krashna v. Oliver Realty, Inc., 895 F.2d 111, 115 (3d Cir. 1990); Smolarek v. Chrysler Corp., 858 F.2d 1165, 1168-69 (6th Cir. 1988), *vacated en banc*, 866 F.2d 838 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989).

199. *See* Daniel N. Kosanovich, *Inching Through the Maze: Recent Developments in Preemption Under the NLRA and the Impact of* Caterpillar, Hechler, *and Others*, 4 LAB. LAW. 225, 253-54 (1988) (noting that courts routinely preempt wrongful discharge or breach of contract claims).

200. *See, e.g.*, Strachan v. Union Oil Co., 768 F.2d 703, 706 (5th Cir. 1985) (holding that in the absence of malice, state law defamation claims are preempted); Mitchell v. Pepsi-Cola Bottlers Inc., 772 F.2d 342, 348 & n.2 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). *But see* Tellez v. Pacific Gas & Elec., 817 F.2d 536, 538 (9th Cir. 1987) (defamation claims not preempted, because the agreement did not govern defamatory statements).

201. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 505-06 (1962).

results in cases involving outrage or IIED claims.[202] Some courts focus on the degree of outrageousness when resolving an IIED claim.[203] But a recent Seventh Circuit decision finding an IIED claim preempted instead examined whether the alleged conduct was authorized by an express or implied term in the agreement.[204] Such an approach would preempt virtually all IIED claims when an employer raises a defense that the conduct was permissible under the express or implied terms of the contract.[205] In contrast, the approach in *Commodore* would not preempt the claim. Instead, the employer's valid defenses could be examined in the state forum. Thus, the preemption doctrine would not be expanded to deny employees protection from outrageous conduct.

Similarly, claims for tortious interference with a business or contractual relationship are difficult to categorize. Some courts have held that such claims are preempted only if breach of a contract is an essential element of the state law claim.[206] However, other courts have found such claims preempted because they require interpretation of contract terms.[207] The analysis of such claims should depend on whether the state law requires the existence of an enforceable contract or the breach of one. In cases such as

202. *See* McCormick v. AT&T Technologies, Inc., 934 F.2d 531, 546 n.4 (4th Cir. 1991) (Phillips, J., dissenting) (noting conflicting results in IIED cases); Johnson v. Beatrice Foods, 921 F.2d 1015, 1021 (10th Cir. 1990) (courts of appeals have reached "varying results"). For examples of courts finding IIED claims preempted, see *McCormick*, 934 F.2d at 537; *Beatrice Foods*, 921 F.2d at 1021-22; Douglas v. American Info. Technologies Corp., 877 F.2d 565, 571-73 (7th Cir. 1989); Willis v. Reynolds Metals Co., 840 F.2d 254, 255 (4th Cir. 1988); Truex v. Garrett Freightlines, Inc., 784 F.2d 1347, 1350-51 (9th Cir. 1985); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1149-50 (9th Cir. 1988). For examples of IIED claims not preempted, see *Tellez*, 817 F.2d at 539; Zaks v. American Broadcasting Cos., Inc., 626 F. Supp. 695, 698 (C.D. Cal. 1985); Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1089 (9th Cir. 1991); Sauls v. Union Oil Co. of Cal., 750 F. Supp. 783, 786-87 (E.D. Tex. 1990).

203. *See, e.g.*, *Truex*, 784 F.2d at 1352; *see also* Stone, *supra* note 22, at 613-14 (criticizing courts which address the degree of the outrageous conduct).

204. *Douglas*, 877 F.2d at 573:

> Because [the cause of action] consists of allegedly wrongful acts directly related to the terms and conditions of her employment, resolution of her claim will be substantially dependent on an analysis of the terms of the collective bargaining agreement under which she is employed. A court will be required to determine whether her employer's conduct was authorized by the explicit or implicit terms of the agreement.

205. Stone, *supra* note 22, at 615.

206. *See* Dougherty v. Parsec, Inc., 872 F.2d 766, 770-71 (6th Cir. 1989) (holding claim for tortious interference not preempted where one of the employer's clients requested plaintiff's discharge in retaliation for filing an OSHA complaint); Fox v. Parker Hannifin Corp., 914 F.2d 795, 800 (6th Cir. 1990) (following *Dougherty*).

207. *See, e.g.*, Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401, 1411-12 (9th Cir. 1992) (holding claims based on plant shutdown, after alleged promises to keep plants open and requesting that employees not seek other employment, preempted by section 301; also stating that the Ninth Circuit generally finds such claims preempted), *cert. denied*, 113 S. Ct. 2927 (1993); Magerer v. John Sexton & Co., 912 F.2d 525, 530-31 (1st Cir. 1990) (holding that retaliation discharge claims under a state statute require interpretation of the CBA and will be preempted); Johnson v. Anheuser Busch, Inc., 876 F.2d 620, 624 (8th Cir. 1989) (holding claim preempted where employee accused of slashing tires of other employees was terminated for violating plant rules because claim required an examination of whether company could rightfully discharge under terms of the CBA).

Commodore, where a contract is not required as an element of the state law, the claim would not be preempted because the terms of a contract would not be implicated.

B. The State Courts

State courts also have reached varying results in analyzing state law claims and section 301 preemption.[208] While it is difficult to categorize claims at the state level and virtually impossible to discern consistent methods of reasoning, state courts that have analyzed claims identical to the ones raised in *Commodore* often have reached similar results.

Like the lower federal courts, state courts rarely preempt claims that parallel Supreme Court decisions, such as claims of discrimination on the basis of race, sex, handicap or another protected class.[209] The courts reason that discrimination claims have their origin in the public policy concerns of state law and not in the collective bargaining agreement.[210] However, the Michigan Court of Appeals has found claims for discrimination based on disabilities to be preempted in two cases.[211] In both, the court found that the discrimination claim depended on an analysis of the labor contract to determine the employer's contractual duty—either to employees on indefinite lay-off or regarding an employee's entitlement to a position based on seniority.[212] Yet this rationale directly contradicts the Supreme Court's decisions in *Gardner-Denver* and *Lingle*, which found that the employer's duty arose from federal or state law.[213] Following the *Lingle* decision, state courts also have uniformly refused to preempt claims of retaliatory discharge for filing a workers compensation claim.[214]

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208. *See* Yonover, *supra* note 2, at 88-89.

209. For examples of discrimination claims not preempted, see Kraft, Inc. Dairy Group v. City of Peoria, 531 N.E.2d 1106 (Ill. App. Ct. 1988) (race); Lewis v. Aalfs Mfg., Inc., 489 N.W.2d 47 (Iowa Ct. App. 1992) (disability); Lowe v. Ford Motor Co., 465 N.W.2d 59 (Mich. Ct. App. 1991) (disability), *appeal denied*, 479 N.W.2d 641 (Mich. 1992); Hall v. Kelsey-Hayes Co., 457 N.W.2d 143 (Mich. Ct. App. 1990) (race); Adkerson v. MK-Ferguson Co., 477 N.W.2d 465 (Mich. Ct. App. 1991) (disability), *appeal denied*, 494 N.W.2d 745 (Mich. 1992); Betty v. Brooks & Perkins, 497 N.W.2d 512 (Mich. Ct. App. 1993) (race and gender); Coulter v. Construction & Gen. Laborers Union Local 320, 812 P.2d 850 (Or. Ct. App. 1991) (sex); Hatridge v. Day & Zimmermann, Inc., 789 S.W.2d 654 (Tex. Ct. App. 1990) (gender).

210. *See Kraft*, 531 N.E.2d at 1110.

211. DesJardins v. Budd Co., 438 N.W.2d 622 (Mich. Ct. App. 1988); Cuffe v. General Motors Corp., 446 N.W.2d 903 (Mich. Ct. App. 1989).

212. *DesJardins*, 438 N.W.2d at 624; *Cuffe*, 446 N.W.2d at 903-04.

213. *See supra* notes 111-17, 164-68 and accompanying text.

214. *See, e.g.*, Lathrop v. Entenmann's, Inc., 770 P.2d 1367 (Colo. Ct. App.), *cert. granted*, 778 P.2d 1370 (Colo. 1989); Ryherd v. General Cable Co., 530 N.E.2d 431, 434 (Ill. 1988) ("[I]f the employee could not bring the claim 'but for' the collective bargaining agreement, the claim is preempted. Conversely, section 301 does not preempt 'state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.'") (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985)); Conaway v. Webster City Prods. Co., 431 N.W.2d 795 (Iowa 1988); Bednarek v. United Food & Commercial Workers, Local 227, 780 S.W.2d 630 (Ky. Ct. App. 1989); Finch v. Hol-

In contrast to the approach of the lower federal courts, claims for defamation or slander have not been preempted by state courts.[215] As in *Commodore*, other state courts reason that the "right to be free from malicious defamation . . . does not arise out of the rights negotiated in [a] labor contract, but out of State law."[216]

Similar to the results in the lower federal courts, state courts have reached varying conclusions regarding claims for intentional infliction of emotional distress or outrage. Some courts have held such claims to be preempted because a determination of whether the employer's conduct was extreme or outrageous would require interpretation of the "just cause" provision of the labor contract.[217] Other courts have not preempted IIED claims on the theory that the outrageousness of the employer's conduct is determined by state law, which has a strong interest in regulating this conduct.[218]

Unlike the decision in *Commodore*, claims for tortious interference with a business or contractual relationship routinely are preempted in other state courts.[219] However, all of these claims alleged interference with a contractual relationship and can be distinguished from *Commodore*, where the plaintiff alleged tortious interference with a business relationship. In Washington, this claim does not require the existence of an enforceable contract or the breach of one.[220] In addition, the complaint in *Commodore* alleged that the defendants interfered with the relationship between the plaintiff and WSH, who was not a party to the collective bargaining agreement.[221]

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laday-Tyler Printing, Inc., 586 A.2d 1275 (Md. 1991); McDaniel v. United Hardware Distrib. Co., 469 N.W.2d 84 (Minn. 1991).

215. *See, e.g.*, Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1090-91 (Ala. 1988); Reynolds Metals Co. v. Mays, 547 So. 2d 518, 523 (Ala. 1989); Thompson v. Public Serv. Co., 800 P.2d 1299, 1305 (Colo. 1990), *cert. denied*, 112 S. Ct. 452 (1991); Krasinski v. United Parcel Serv., Inc., 530 N.E.2d 468, 472 (Ill. 1988); Batson v. Shiflett, 602 A.2d 1191, 1210 (Md. 1992); Hanley v. Safeway Stores, Inc., 838 P.2d 408, 412 (Mont. 1992).

216. *Krasinski*, 530 N.E.2d at 472.

217. *See, e.g.*, Moreau v. San Diego Transit Corp., 258 Cal. Rptr. 647 (Cal. Ct. App. 1989); Abreu v. Svenhard's Swedish Bakery, 257 Cal. Rptr. 26 (Cal. Ct. App. 1989); Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992) (preempting IIED claim against supervisor).

218. *See Hanley*, 838 P.2d at 412; Coulter v. Construction & Gen. Laborers' Union Local 320, 812 P.2d 850, 853 (Or. Ct. App. 1991).

219. *See, e.g.*, Fleming v. United Parcel Serv., 604 A.2d 657, 667-68 (N.J. Super. Ct. Law Div. 1992); Nash v. AT&T Nassau Metals, 381 S.E.2d 206 (S.C. 1989); *Retherford*, 844 P.2d at 969-70; Joy v. Kaiser Aluminum & Chem. Corp., 816 P.2d 90 (Wash. Ct. App. 1991).

220. *Commodore*, 839 P.2d at 323.

221. *Id.* at 322-23.

VI
CONCLUSION

Lower federal courts and state courts often have reached conflicting results in analyzing the issue of section 301 "complete preemption" of a union member's state law claim. While these courts tend to focus either on the negotiability of the state law right or whether the employer's defenses implicate the collective bargaining agreement, the model adopted by the Washington Supreme Court identifies problems with these approaches. Initially, Congress restricted the issue to the preemption of claims "for violation of [labor] contracts."[222] The Supreme Court interpreted this authorization to also include suits for violation of a labor contract in substance though not in form.[223] In making this determination, the Court's inquiry consistently has focused on the source of the tort duty. Claims that allege the violation of a duty grounded in the labor contract are preempted, but duties that derive from a source of state law independent from a labor contract are not. The approach adopted by the Washington Supreme Court provides parties to a collective bargaining agreement with a consistent method of adjudicating state law claims. Most important, the approach is faithful to the "complete preemption" doctrine developed by the Supreme Court in its line of cases and to the language of section 301. Nevertheless, the clear trend in the lower federal courts, as well as in some state courts, is towards the expansion of section 301 preemption, thus denying union employees the safeguards created by state legislatures and courts. If this trend continues, it may have a detrimental impact on the ability of unions to recruit employees and to effectively bargain to protect their rights.

222. 29 U.S.C.A. § 185(a).
223. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210-11 (1985).