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# On the Interface Between Labor and Employment Law

Joseph R. Grodin†

It is useful to think of labor law and employment law as alternative and complementary ways of governing the workplace, one aiming to institutionalize a mechanism for governance through collective bargaining, the other governing directly through legal regulation. Labor law and legal regulation coexist in both the non-union and union workplace—even unorganized workers have the right to engage in concerted activities for mutual aid or protection, and workers covered by a collective bargaining agreement enjoy the protection of certain applicable laws—but the relationship between the two is often ambiguous and full of tension. Somewhat like the interaction of tectonic plates moving underneath the earth's surface, the two governance modes come into contact with one another across a series of doctrinal fault lines. Consequently, when they do come into contact with one another, their interaction gives rise to the legal equivalent of earthquakes and volcanic eruptions.

In the unionized workplace the issue is not, for the most part, a matter of substantive conflict. While questions may arise regarding the applicability of particular laws to the collective bargaining context<sup>1</sup> or regarding whether substantive rights under a particular law are subject to waiver or have in fact been waived through collective bargaining,<sup>2</sup> in general, states as well as the federal government may regulate working conditions and apply those regulations to the unionized workplace.<sup>3</sup> Thus, the tension between legal regulation and collective bargaining has primarily gathered

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1. See, e.g., *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (holding it was a violation of the Labor Management Relations Act for the California Labor Commissioner, having authority to entertain claims by workers for wages due, to refrain from assisting those workers covered by a collective bargaining agreement).

2. See *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410 n.9 (1988) (reserving question whether a union may waive its members' individual, nonpre-empted state-law rights, but insisting upon "clear and unmistakable evidence" of waiver).

3. The Supreme Court has acknowledged that "pre-emption [sic] should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987) (upholding application to collective bargaining employees of statute providing a one-time severance benefit to employees in the event of a plant closing).

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around the institution of arbitration and the question of whether, or to what extent, the existence of an arbitration procedure or its actual utilization might affect the rights of individual employees to assert claims under external law independently of that procedure.

Under the Labor Management Relations Act (LMRA), there appear to be three different answers to that question, depending upon the nature of the claims being asserted:

(1) With respect to claims under the LMRA itself, for interference with or discrimination on the basis of statutorily protected rights (Sections 8(a)(1) or (3)), an individual, or the union on her behalf, may file a charge with the National Labor Relations Board. However, the Board will in most instances defer action on the charge until arbitration has occurred. In addition, it will then defer to the arbitrator's award unless the Board determines that the proceedings were not fair or that the award is not consistent with the policies of the statute. Such a process is known as "*Collyer/Spielberg* deferral," after the leading cases which established it.<sup>4</sup>

(2) With respect to claims under state law, a pair of United States Supreme Court decisions—*Allis Chalmers v. Lueck*<sup>5</sup> and *Lingle v. Norge Division of Magic Chef, Inc.*<sup>6</sup>—ostensibly stand for the proposition that a bargaining unit worker may sue independently of the agreement unless his suit requires that the agreement be interpreted. In this instance, the suit is barred by the doctrine of "Section 301 preemption." Section 301 is the provision of the LMRA which provides for judicial enforcement of collective bargaining agreements and their provisions for arbitration.

(3) Finally, with respect to claims under federal laws other than the LMRA, the court held in *Alexander v. Gardner-Denver Co.*<sup>7</sup> that a worker's statutory claim (a Title VII claim) and his grievance under the collective bargaining agreement (even though it contained a provision prohibiting racial discrimination) were separate and distinct. Alexander, therefore, was free to pursue his statutory claim even after losing in arbitration.

#### THE GILMER QUAKE

Seventeen years after *Alexander*, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*<sup>8</sup> *Gilmer* held that an employee's agreement to arbitrate work-related claims with his employer was a bar to his action

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4. See *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Dubo Mfg. Corp. and United Steelworkers of America, AFL-CIO*, 142 NLRB 431 (1963). *Collyer* involved a refusal to bargain charge. The Board has changed course several times with respect to the application of *Collyer* to individual (8)(a)(1) and (8)(a)(3) charges, but its most recent position favors deferral in such cases as well. See *United Technologies Corp.*, 268 N.L.R.B. 537 (1984).

5. 471 U.S. 202 (1985).

6. 486 U.S. 399 (1988).

7. 415 U.S. 36 (1974).

8. 500 U.S. 20 (1991).

for age discrimination under the federal Age Discrimination in Employment Act.<sup>9</sup> While *Gilmer* arose in the non-union context, the opinion reverberated in the collective bargaining arena because aspects of the court's reasoning undercut an important element of the *Alexander* rationale.

In *Alexander* the court was highly critical of arbitration as an adequate substitute for judicial process in the enforcement of statutory claims. Among the Court's reasons were the possible lack of arbitral competence and the relative informality of the fact-finding process. Indeed, it was due to such casual fact-finding that the court refused to adopt the NLRB deferral policy as a model. By the time it decided *Gilmer*, however, the Court had changed its institutional mind on such matters and rejected all of *Gilmer*'s similar arguments. Thus, this leg of *Alexander* no longer stands.

The *Alexander* holding, however, also rested on two other grounds: the distinction between contractual and statutory claims; and the potential for tension between the individual and the union's institutional interests. And it was on these grounds (as well as upon a third, and less convincing ground regarding the fact that *Alexander* was not decided under the Federal Arbitration Act) that the *Gilmer* court distinguished *Alexander* and its progeny, *Barrentine v. Arkansas-Best Freight System, Inc.*<sup>10</sup> and *McDonald v. City of West Branch, Mich.*<sup>11</sup>

First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims,* the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was *the tension between collective representation and individual statutory rights*, a concern not applicable to the present case.<sup>12</sup>

Subsequently, in *Livadas v. Bradshaw*, the Court went seemingly out of its way to observe that,

In holding that an agreement to arbitrate an Age Discrimination in Employment Act claim is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in [*Alexander*], permitting a discharged employee to bring a Title VII claim, notwith-

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9. *Id.* at 35.

10. See 450 U.S. 728 (1981) (applying *Alexander* to a wage claim under the Fair Labor Standards Act).

11. See 466 U.S. 284 (1984) (applying *Alexander* to a Section 1983 claim by a discharged police officer).

12. *Gilmer*, 500 U.S. at 35 (emphasis added).

standing his having already grieved the dismissal under a collective-bargaining agreement.<sup>13</sup>

With the exception of the Fourth Circuit,<sup>14</sup> all of the circuits which have considered the question have decided that *Alexander* survives *Gilmer*. That is, an employee covered by a collective bargaining agreement may pursue federal statutory claims notwithstanding the existence of an arbitration procedure.<sup>15</sup> Moreover, these courts have maintained the viability of *Alexander* even in cases in which the line between statutory and contractual rights has been blurred by contractual language that authorizes, or which could be construed as authorizing, arbitral determination of statutory claims independent of or in addition to claims arising otherwise under the agreement.<sup>16</sup> The Supreme Court has now granted *certiorari* in a case out of the Fourth Circuit, and will presumably decide the issue before the end of its current term.

I think the Court should (and will) reaffirm *Alexander*. I should say—in order that my biases be revealed—that I think *Gilmer* was a profound mistake on the part of the Supreme Court. Whatever the merits of arbitrating statutory claims might be in other contexts, allowing employers to divert unilaterally (or more precisely, through adhesion “contracts”) claims from litigation to arbitration (where the process is often established and controlled by employers) under a statute designed to regulate the conduct of

13. *Livadas*, 512 U.S. at 128 n21.

14. The Fourth Circuit first established its unique position in *Austin v. Owen-Brockway Glass Contain, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 432 (1996). A subsequent opinion, following *Austin*, is currently under review by the United States Supreme Court. See *Wright v. Universal Maritime Corp.*, 121 F.3d 702 (1997) (4th Cir.), *cert. granted*, 118 S.Ct. 1162 (1998).

15. See *Tran v. Tran*, 54 F.3d 115 (2nd Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996); *Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997); *Pryner v. Tractor Supply Co., Inc.*, 109 F.3d 354 (7th Cir. 1997), *cert. denied*, *Tractor v. Pryner*, 118 S.Ct., 294 (1997); *Varner v. Natl. Super Mkts., Inc.* 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, *Natl. Super Mkts. v. Varner*, 117 S.Ct. 946 (1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997). The Sixth Circuit initially followed *Austin*, 78 F.3d 875, on the basis of contract language which it assumed allowed employees to reach arbitration on statutory claims without union permission. *Martin v. Dana Corp.*, 114 F.3d 421 (3rd Cir. 1997). But after the affected union called the court's attention to the fact that its assumption was incorrect, the court reversed ground in an unpublished opinion.

16. In *Austin*, 78 F.3d at 879-80, the collective bargaining agreement (CBA) contained the following provision: “The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status . . . 2. This contract shall be administered in accordance with the applicable provisions of the Americans with Disability Act . . . 3. Any dispute under this Article shall be subject to the grievance procedure.”

In *Pryner*, 109 F.3d at 356, one of the two CBAs involved in the opinion provided that “in accordance with applicable Federal and State law, neither the company nor the Union will discriminate against employees . . . in regard to any terms or conditions of employment on the basis of race, creed, religion, national origin, sex, or age.”

The language in *Martin*, 114 F.3d at 421, was even more specific: “Any and all claims regarding equal employment opportunity provided for under this Agreement or under any federal, state, or local fair employment practice law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitration provisions of this Agreement.”

employers would seem highly questionable in terms of both public policy and legislative purpose.<sup>17</sup>

But collective bargaining arbitration is a different matter, calling for a different analysis. In a collective bargaining relationship we assume rough equality of bargaining power, and even where that assumption is not necessarily correct, bargaining power is certainly greater among a collection of workers than it is for a single employee. An individual "bargain" was the sort of agreement exemplified in *Gilmer*. Arbitration of statutory claims in the collective bargaining context is problematic for some of the same reasons I find *Gilmer* troublesome, but it is problematic for other reasons as well.

The distinction between contractual and statutory claims has become a bit blurred since *Alexander* was decided. Subsequently, contract clauses which suggest the possible authorization of an arbitrator to decide statutory claims *as such* have emerged. Thus, these contract clauses have brought to bear statutory remedies in addition to the more modest remedies traditionally associated with grievance arbitration.<sup>18</sup> The distinction has also become blurred by increased awareness of and sensitivity toward employment discrimination statutes on the part of all players—management and union lawyers, as well as arbitrators—and a consequent tendency to consider, within the context of grievance arbitration, claims based upon legal principles developed within the statutory context.<sup>19</sup>

These developments, however, do not justify ignoring the fundamental difference which still exists between arbitrating a statutory claim and arbitrating a contract claim. While it is possible that a union and an employer might deliberately agree that employees would be required to arbitrate statutory claims to the exclusion of litigation, it remains unlikely that they would do so. In order to reflect the reality of likely intentions and to avoid the complications that would otherwise exist, courts should, at a minimum, reverse the usual presumption of arbitrability and declare, in the context of collective bargaining, a contrary presumption with respect to statutory claims. In the pending *Wright* case, the language of the agreement does not

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17. My views on this score are set forth in Joseph Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1 (1996). See also *Duffield v. Robertson Stephens & Co.*, \_\_\_F.3d\_\_\_, 1998 WL 227469, \*6 (9th Cir. 1998) (adopting the EEOC position that an agreement to arbitrate Title VII claims must be voluntary and not a condition of employment).

18. See language set forth, *supra*, note 16. An agreement that has recently come to my attention as an arbitrator is even more specific: "Claims of discrimination on the basis of disability or any other unlawful employment practices that could be raised in individual statutory or common law claims must also be brought through this arbitration procedure by either the employee or the Union."

19. In a recent unpublished case involving a claim of discrimination against the City of Emeryville, California, the union argued, and the arbitrator agreed, that contract language prohibiting discrimination "in violation of applicable law" permitted the award of damages for emotional distress.

make explicit reference to statutory claims, and the Supreme Court could reverse on that ground alone.<sup>20</sup>

The better course, however, would be for the Supreme Court to affirm *Alexander* on broader grounds. Such grounds should include the potential for tension between individual and union in the actual handling of an arbitration matter, as recognized in *Alexander*. This should be the result, particularly in situations where the individual's claim may conflict with the interests of others within the bargaining unit toward whom the union also owes a duty of fair representation. Harassment cases and disability cases requiring accommodation are but a few examples of that potential for conflict.

Moreover, the union typically controls access to the arbitration process. In *Alexander* the union had taken the plaintiff's grievance to arbitration, but what happens if the union decides not to do that? If the union's refusal to take the case to arbitration is discriminatory, arbitrary, or in bad faith, then the union has breached its duty of fair representation; however, a union might have many valid reasons for not proceeding, ranging from lack of money to lack of conviction on the merits. Failing to proceed might possibly implicate either preclusion or exhaustion issues. Also, imposing upon unionized employees the additional obstacle of pursuing a process which, at best, involves delay and, at worst, stacks the deck against the individual employee, would frustrate the policies underlying the applicable statutes. Furthermore, it might provide an additional obstacle to union organization.

Even if these problems did not exist, the question would remain whether a union should be able to bind the employees it represents to a waiver of their right to litigate statutory claims in court. I think the answer should be no, even though an employee's interest in such a regime would presumably be better protected than in a regime of individual bargaining. The right to sue for discrimination does not owe its existence to the bargaining process; instead, it reflects important public policies which are independent of that process. Moreover, it includes the right to trial by jury which ought to be waivable only on an individual basis.

The cases which have reached the Circuit courts thus far have involved plaintiffs seeking to bypass collective bargaining arbitration altogether, whereas *Alexander* involved a plaintiff who submitted to the arbitration process and lost. It may be that the Court, in light of *Gilmer*, will be tempted to leave open the possibility of revising *Alexander* in the direction of according greater finality to the award. This might be the result particularly

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20. The arbitration clause in *Wright* read simply, the "Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment." *Wright v. Universal Maritime Service Corp.*, No. 96-2850, 1997 WL 422869, at \*2 (4th Cir. (S.C.), July 29, 1997).



in cases in which the contract clearly gives the arbitrator authority to invoke statutory norms and remedies, or in which the individual invites the arbitrator to exercise her contractual authority to that end. It is conceivable that the Court would entertain the alternative it rejected in *Alexander*—some form of deferral to the arbitration award along the lines of *Collyer/Spielberg*—on the ground that the rationale for its rejection has partly evaporated with the *Gilmer* decision. Apart from the fact that any such discussion would be dicta in the pending case, however, that too would be unwise. It would not avoid the potential for tension between the union and the individual, and it would create an unmanageable administrative burden for the courts. Of course, if an employee, fully advised, voluntarily submits her statutory claim to an arbitrator under a collective bargaining agreement procedure, and signs a submission agreement to that effect, she should be bound by the result. Short of that, however, *Alexander* should control.

If the Supreme Court accepts all of my advice and leaves *Alexander* alone, will I be happy? Not quite. Reconsideration, and hopefully reaffirmation, of *Alexander* should provide stimulus for looking carefully at the other two models of labor law/employment law interface. The NLRB's deferral policy is distinguishable in principle from *Alexander*: statutory rights under the LMRA are less likely to involve tension between individual and union, and the NLRB is in a better position than a court to determine on a case-by-case basis whether deferral to arbitration and deferral to the award are appropriate as a matter of statutory policy. The manner in which the NLRB currently makes those determinations—sometimes deferring blindly to union-management adjustment boards, for example—is highly problematic and requires administrative and judicial scrutiny.

The *Lueck/Lingle* “rule,” which precludes claims based upon external law when interpretation of the collective bargaining agreement is required, is more fundamentally in need of judicial attention. The lower courts are in disagreement upon application of the rule, particularly in situations where the employer invokes the agreement as a defense, but the roots of the disagreement can be traced to a lack of coherence in the basis for the rule itself.

In *Lueck* the Court explained that the rule stems from the principle, established earlier in *Teamsters v. Lucas Flour*, that the meaning given to a contract phrase or term be subject to uniform federal interpretation.<sup>21</sup> That principle made sense in the context of *Lucas Flour*, where the question was whether a state court was bound to apply a federally created presumption that a union may not strike over matters subject to arbitration.<sup>22</sup> It makes little sense, however, where the question is one of contract interpretation in the absence of any federal policy explaining how it should be interpreted, as

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21. See *Allis Chalmers v. Lueck*, 471 U.S. 202, 209-10 (1985); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

22. *Lucas Flour*, 369 U.S. at 97-98.

is generally the case, and as was the case in *Lueck* itself. In *Lingle* the Court provided a somewhat different rationale: both federal policy and the intent of the parties require that interpretation of collective bargaining agreements be performed by arbitrators.<sup>23</sup> This rationale makes more sense, but it fails to explain two anomalies: why the principle of arbitral priority should apply only to state, and not federal, statutes and why the principle in any event should result in precluding the state cause of action rather than in a requirement that the arbitrator's interpretation be obtained before proceeding to court. *Lueck* involved an attempt by an employee to utilize an employer's commitment made through collective bargaining as a basis for obtaining a remedy not otherwise available under the agreement. The coherence of Section 301 preemption doctrine would be better served by confining the doctrine to such a situation.

#### CONCLUSION

All three models of interface between labor and employment law—the NLRB model, the *Alexander* model, and the Section 301 model—involve common questions. Assuming that a general policy of encouraging the resolution of disputes through arbitration rather than litigation exists, to what extent are we prepared to allow that choice to be made by unions on behalf of represented employees? And, assuming there exists a policy of encouraging—or at least not hindering—union organization, to what extent is it desirable to withhold from union-represented employees rights of access to the legal system and its remedies? Perhaps these are ultimately questions for Congress to answer, but given legislative reluctance to tackle controversial problems of labor-management relations, they are questions that courts and students of the law will undoubtedly be left to grapple with for years to come.

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23. See *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410-11 (1988).