Collective Rights and Individual Remedies: Rebalancing the Balance after Lingle v. Norge Division of Magic Chef, Inc.

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Rebalancing the Balance After *Lingle v. Norge Division of Magic Chef, Inc.*

by

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In *Lingle v. Norge Division of Magic Chef, Inc.*, the United States Supreme Court held that a wrongful discharge claim brought by a unionized employee is not preempted by federal labor law. *Lingle* did not resolve all of the preemption questions that have arisen since organized employees first asserted the relatively new common-law tort of "wrongful termination in violation of public policy." *Lingle* did establish that unionized employees need not rely exclusively on grievance and

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2. *Lingle* left open many questions, however, including whether a wrongful discharge claim by a unionized employee based on the breach of the implied covenant of good faith and fair dealing is preempted by federal labor law; whether a unionized employee can have a wrongful discharge claim based on the breach of an implied contract; and whether the Court's holding applies to wrongful discharge cases not based on state statutes.

3. The Arizona Supreme Court summed up the development of the public policy exception to the at-will rule:

   The public policy exception to the at-will doctrine began with a narrow rule permitting employees to sue their employers when a statute expressly prohibited their discharge. See Kouff v. Bethlehem Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949) (statute prohibiting discharge for serving as an election officer). This formulation was then expanded to include any discharge in violation of a statutory expression of public policy. See Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusal to commit perjury). Courts later allowed a cause of action for violation of public policy even in the absence of a specific statutory prohibition.

arbitration remedies provided for in the vast majority of collective bargaining agreements. When a unionized employee is fired from her job, \textit{Lingle} permits that employee to raise common-law tort claims in addition to pursuing grievance and arbitration remedies.

The preemption controversy began when employers, seeking to limit their liability to the mild sanctions available under federal labor law, raised preemption as a defense to organized employees' wrongful termination tort claims. Resolution of this preemption question required determination of whether an individual claim of wrongful termination by a unionized worker should be allowed to go forward. This focus on individual claims of wrongful termination has resulted in the neglect of a much broader and more troubling question—the effect on organized labor of recognizing a cause of action for wrongful termination. Allowing an employer's preemption defense to frame and dominate the question of whether an individual, unionized employee may bring a wrongful termination action ignores the troubling policy implications for organized labor that are raised by judicial recognition of wrongful discharge actions.

Judicial recognition of wrongful discharge actions, while necessary to provide some job security to at-will employees, may be aggravating the already tenuous position of unions. Unionization has declined in the last thirty years\textsuperscript{4} and numerous theories have been suggested to explain this decline. The proffered reasons range from extra-union factors such as the troubled economy, to union-related factors such as the inadequacy of the federal labor laws, to union-specific reasons such as corruption.\textsuperscript{5}

\textsuperscript{4} Unionization in this context means union membership. Over the last thirty years, union density, defined as the number of union members compared to the nonagricultural work force, has declined. See Weller, \textit{Promises to Keep: Securing Workers' Rights to Self Organization under the NLRA}, 96 Harv. L. Rev. 1769, 1771 (1983); see also R. Freeman & J. Medoff, \textit{What Do Unions Do?} 221-45 (1984).

Since the mid-1950s, private sector unionism in the United States has been on the decline. While the absolute number of union members has increased, the labor force has grown so much more rapidly that the union share of employees has dropped precipitously. In 1956, 34 percent of private nonagricultural workers were organized, and in 1980, just 24 percent—a 10 point decline in union density that is unprecedented in American history.

R. Freeman & J. Medoff, \textit{supra}, at 221; see also Baptiste, \textit{Challenges to Unions in the 1980s: in Labor Law Developments}, ch. 11-1 (J. Moss ed. 1986) ("While unions currently represent more than 20 million working men and women in America, the critics quickly point out that this figure represents only 28 percent of those eligible to join a union—a dramatic decline from 45 percent in 1954.").

\textsuperscript{5} R. Freeman & J. Medoff, \textit{supra} note 4, at 221-46; see also Belfort, \textit{Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation}, 1987 Wis. L. Rev. 67, 68-69 (Although clearly advantageous for management, the practice of double-breasting—whereby a single "employing entity establishes both a unionized firm and a nonunionized firm"—poses a significant threat to the labor move-
While each of these explanations has merit, no single theory fully accounts for the demise of organized labor. This Article suggests that judicial recognition of wrongful termination actions by at-will employees is contributing to that demise.\(^6\) Since

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the burgeoning of wrongful discharge claims, numerous unionized employees have ignored reinstatement and back pay remedies made available through the grievance and arbitration provisions of their collective bargaining agreements. Instead, unionized employees have brought wrongful termination actions in state and federal courts in an attempt to recover larger tort awards. These employees are evidencing their disdain for the protections provided by unions and the grievance and arbitration process despite the fact that both traditionally are regarded as primary reasons for unionization.8

The effect of wrongful termination actions on organized labor and the demise of unionization deserves fuller consideration than it has received by courts and commentators. The protection of employees’ rights of self-organization and bargaining are at the heart of our national labor law.9 The merits of collective bargaining, which have been widely written about, include: worker participation,10 reduction of wage disparity between white and black workers,11 increased productivity,12 and provi-

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11. Weiler, supra note 4, at 1826.

12. Id. at 1825.
sion of some measure of worker power. The real merit of unionization, although not subject to empirical validation, may be the fact that "[c]ollective bargaining . . . has provided millions of workers with an effective voice in industrial government and has brought due process and human dignity to their working lives."14

This Article first examines the unexplored implications of judicial recognition of wrongful termination actions on organized labor. Most courts considering wrongful termination claims by unionized workers focus on the nature of the wrongful termination claims at issue and whether they should be preempted.15 For courts considering the effect of a collective bargaining agreement on individual workers’ wrongful termination claims, the case-by-case method mandated by the preemption approach necessarily excludes an examination of the collective interest of unions. Thus, no court has fully considered the ramifications of recognizing the wrongful discharge cause of action for either organized labor or national labor policy. Answering the question of whether it is fair or just to preempt a wrongful discharge claim by an individual employee who belongs to a union does not address the issue of whether there are any negative implications for organized labor. The Article then critiques the preemption approach to the question whether unionized employees may bring a wrongful termination action and the Supreme Court’s answer to this question in Lingle. The Court’s answer is inadequate because it considers only the individual interest in pursuing a wrongful termination claim rather than addressing the group interest at stake. This Article then suggests that arbitrators be given the authority to award punitive and compensatory damages, thereby equalizing the remedies available in collectively bargained arbitration proceedings with those recoverable in wrongful termination actions. This solution would maintain the strength of wrongful discharge actions for at-will employees and protect the policy of encouraging collective bargaining that underlies our federal labor laws.

14. Summers, supra note 10, at 34.
I. The Scope of the Problem

A. The NLRA and Wrongful Termination Actions

The National Labor Relations Act \(^{16}\) (NLRA) affords employees the right to organize and to bargain collectively with their employers.\(^ {17}\) Since its enactment in 1935, the NLRA has provided workers with some measure of job security. The vast majority of collective bargaining agreements protect covered employees\(^ {18}\) from arbitrary discharge by limiting terminations to those granted "for cause" or for "just cause."\(^ {19}\) Unionized workers who are discharged in violation of just cause provisions may seek reinstatement and back pay through grievance and arbitration procedures.\(^ {20}\)

An employee typically will file a grievance when she believes that her rights under the collective bargaining agreement have been violated. The first step of the grievance is usually a discussion with the employee's immediate supervisor. If the problem is not resolved to the employee's satisfaction, the grievance may be brought to higher level management and "[a]t each stage, management may affirm its original decision, grant the grievance, or offer to settle it through some form of compromise."\(^ {21}\)

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\(^{17}\) Section 157 of the NLRA provides that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [codified at 29 U.S.C. § 158(a)(3) (1988)].

\(^{18}\) Employees covered by a collective bargaining agreement include union members and all others in the bargaining unit. The union represents all in the unit, members and nonmembers alike. See Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). In this Article, references to unionized or organized employees refers to all employees represented by the union, not just to union members. Unless the context specifically provides these, references do not include those who might be protected by the NLRA by virtue of "concerted activit[y] . . . for mutual aid or protection." 29 U.S.C. § 157 (1988).


\(^{20}\) Taldone, supra note 19, at 43 ("[Ninety-eight] percent of collective bargaining agreements have grievance arbitration procedures . . . .").

If not resolved through this progressive grievance system, the union may choose to bring the matter to binding arbitration.\textsuperscript{22}

Historically, non-unionized employees had no such protection from arbitrary discharge. In England, the rule was if the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not.\textsuperscript{23}

The United States rejected the British presumption of employment for one year. Workers without a written employment contract were considered at-will and were employed at the whim of their employer. Horace Wood\textsuperscript{24} decided unilaterally, and with little precedent to support him, that "the rule is inflexible, that a general or indefinite hiring is \textit{prima facie} a hiring at will."\textsuperscript{25} Pursuant to this employment at will doctrine an employee could be fired for any reason.\textsuperscript{26} A purported rationale for the employment at will doctrine was the notion that both parties to the employment relationship should have the freedom to terminate that relationship.\textsuperscript{27} As it became evident that the parties to the employment relationship did not stand on equal footing because of the employee's economic dependence on the employer, dissatisfaction with the harshness of the employment at will rule increased.

During the last few years, numerous courts have begun to fashion exceptions to the employment at will doctrine.\textsuperscript{28} The demise of the doc-

\textsuperscript{22} Id.

\textsuperscript{23} H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE 6 (2d ed. 1987) (citing 1 W. BLACKSTONE, COMMENTARIES 422, 425 (Christian, 12th ed. 1793)).

\textsuperscript{24} In addition to creating the employment at will rule, Wood authorized a treatise. See H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).


\textsuperscript{27} H. PERRITT, supra note 23, at 9.

trine has been widely applauded\textsuperscript{29} for providing needed job security to the vast majority of employees not covered by collective bargaining agreements.\textsuperscript{30} While not all commentators are in accord,\textsuperscript{31} judicially fashioned exceptions to the doctrine rapidly are gaining acceptance and are recognized in some form in most states.\textsuperscript{32}

Neither critics nor proponents, however, have considered the possibility that the increasing recognition of a wrongful discharge tort could affect organized labor negatively. Remedies available to discharged employees, under the NLRA and most collective bargaining agreements, are limited to reinstatement and back pay, while successful plaintiffs in wrongful termination actions can recover extra-contractual damages in-


\textsuperscript{30} “[I]n 1978 union membership as a proportion of non agricultural employment stood at 24.0 percent—the lowest penetration ratio since 1937.” Catler, \textit{supra} note 26, at 495; \textit{see also} Blades, \textit{supra} note 19, at 1410. Moreover, many workers are excluded from the definition of “employee” in \S 152(3) of the NLRA. Finally:

There are many types of employees, like professionals and other members of the white-collar class, whose numbers are increasing with the advances of modern technology, who have generally preferred not to be represented by labor unions. For such employees, it is no answer to suggest that they should seek salvation in unions—that in order to maintain their personal autonomy in the face of the huge industrial employer they should surrender it to the massive labor union.

Blades, \textit{supra} note 19, at 1410-11 (footnotes omitted).


\textsuperscript{32} See K. MCCULLOUGH, TERMINATION OF EMPLOYMENT, EMPLOYEE AND EMPLOYER RIGHTS (1984) (description of each state's particular stance on wrongful termination).
cluding punitive damages. Some unionized employees, in an attempt to recover extra-contractual remedies, bypass the procedures provided for in their collective bargaining agreements and bring tort actions for wrongful discharge.

B. An Example of the Problem

The problem discussed here is well illustrated by a scenario in which an employee, such as a truck driver employed by a dairy, is told to deliver sour milk. When the truck driver refuses to deliver the sour milk, she is discharged, allegedly in violation of state public policy. The truck driver's recourse traditionally depended on whether she was covered by a collective bargaining agreement or was an at-will employee.

If the truck driver was covered by a collective bargaining agreement, it is likely that the agreement contained both a "just cause" discharge provision and a grievance and arbitration provision. The truck driver would file a grievance with the union and, depending on the particular collective bargaining agreement involved, begin the multi-step grievance process that ultimately could lead to binding arbitration. If the arbitrator found that the employer violated the collective bargaining agreement by discharging the truck driver, the arbitrator would then fashion the appropriate remedy, generally reinstatement and back pay.


34. See cases cited supra note 7.

35. These facts are based on those in Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 417 U.S. 1099 (1985).

36. An employee need not be a union member to be represented by a union. A union is the representative of all employees within the bargaining unit regardless of whether an employee joins the union. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). While this creates free-rider problems, it does not affect the claim for relief if an employee is discharged in violation of the collective bargaining agreement.

37. The majority of collective bargaining agreements provide that an employee may be discharged only for "cause" or for "just cause." See Taldone, supra note 19. In addition, the majority of collective bargaining agreements contain grievance and arbitration procedures. See supra note 20.

38. For a detailed description of the grievance to arbitration process, see F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 106-68 (3d ed. 1973).

39. O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 497-520 (2d ed. 1983). According to this author, "[w]here an arbitrator finds that a discharge was not for 'just cause,' an essential part of the remedy is reinstatement." Id. at 499. Moreover, "[a]rbitrators hold that the power to decide that there is insufficient cause to support the discipline imposed includes the power to award back pay to remedy the wrong." Id. at 512. An arbitrator's power to grant additional relief will be discussed in more detail, infra notes 192-200 and accompanying text.
Until recently, a truck driver who was an at-will employee would have had virtually no recourse\textsuperscript{40} because at-will employees could be fired for a good reason, a bad reason, or for no reason at all.\textsuperscript{41} In most states today, however, the discharged truck driver could bring an action for wrongful termination under one of the exceptions to the employment at will doctrine. She could argue that her discharge violated the state’s public policy of supplying wholesome milk,\textsuperscript{42} that she had an implied contract with her employer that she would not be fired for refusing to deliver spoiled milk,\textsuperscript{43} or that her discharge violated the covenant of good faith and fair dealing.\textsuperscript{44} The truck driver would prefer to recover in a tort action under the public policy exception\textsuperscript{45} because the damages available include punitive damages as well as compensatory damages for pain, suffering, and mental anguish.\textsuperscript{46} These damages often result in greater

\textsuperscript{40} The employee could have sought relief only if her discharge violated a particular statute such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).
\textsuperscript{41} \textit{See e.g.}, Love, supra note 33, at 553.
\textsuperscript{44} \textit{See e.g.}, Savage v. Holiday Inn Corp., 603 F. Supp. 311 (D. Nev. 1985); Gray v. Superior Court, 181 Cal. App. 3d 813, 226 Cal. Rptr. 570 (1986); Flanigan v. Prudential Fed. Sav. & Loan Ass’n, 720 P.2d 257 (Mont. 1986); see also Weeks, supra note 42, at 617-18; DeGuisepppe, supra note 42, at 24-30.
court awards than are available through arbitration proceedings. Indeed, the average back pay award by the National Labor Relations Board (NLRB) for an unfair labor practice is $2,000,47 while in California the average recovery in a wrongful termination suit that went to trial was $450,000 to $548,000,48 and the average award for a wrongful termination claim after a jury trial was $646,855.49

C. Unionized Employees Prefer Wrongful Discharge Actions

Because of the possibility of an enhanced award in a wrongful termination action, many organized employees who are discharged now prefer to sue their former employers in tort rather than to proceed under their collective bargaining agreements or by way of unfair labor practice charges under the NLRA.50 If a discharged organized employee proceeds under the collective bargaining agreement or the NLRA, the employee's remedy is limited to reinstatement and back pay.51

The availability of richer redress in a wrongful termination action is a powerful incentive for an employee to bypass collective bargaining agreement remedies or to seek a tort recovery in addition to contractual remedies. The plaintiff in Lingle v. Norge Division of Magic Chef, Inc., although covered by a collective bargaining agreement, sought the enhanced recovery available in a wrongful termination action. Lingle had participated and prevailed in arbitration proceedings and was awarded

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Olsen, Wrongful Discharge Claims Raised By at Will Employees: A New Legal Concern for Employers, 32 LABOR L.J. 265, 283-84 (1981) (citing Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E. 2d 353 (1978), in which only $749.00 in lost pay was awarded but plaintiff received $25,000 in punitive damages).

47. A. Cox, O. Bok & R. Gorman, Labor Law, Cases and Materials 262 (10th ed. 1986) (indicating that this was the average back pay award in 1980).

48. "Two recent surveys of California superior court decisions reveal that plaintiffs in wrongful termination cases prevail in 90-95% of the cases with an average judgment of $450,000 to $548,000." Comment, Employment at Will: Just Cause Protection Through Mandatory Arbitration, 62 WASH. L. REV. 151, 168 (1987) (citing Lopetka, The Emerging Law of Wrongful Discharge, 40 Bus. LAW. 1 (1984) (authored by Warren Martin)). The author particularly noted the inherent bias in the two surveys. Furthermore: A February 1984 study by a special committee of the State Bar of California reported on a survey of California wrongful dismissal cases proceeding to a jury verdict. In 53 percent of the plaintiff verdicts, punitive damages were awarded. In 76 percent of that 53 percent, awards were greater than $100,000 and in 35 percent, awards exceeded $600,000.


50. See supra note 7.

51. See Zimmerman & Howard-Martin, supra note 19, at 223-24. Section 160(c) of the NLRA empowers the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."
reinstatement and full back pay. In her state court tort action for wrongful termination she sought "reinstatement in her old job, not simply another job that she was given after the arbitration, back pay at a fully compensatory level, not the special low amount provided for by the collective bargaining agreement for those reinstated in arbitration, and punitive damages." 52 Lingle is not an isolated instance,53 and neither organized workers nor the courts have been deterred by the usual collective bargaining agreement provision that the remedies provided therein are exclusive.54

II. The Preemption Approach

Until recently, employees covered by collective bargaining agreements who tried to bring wrongful termination actions met with mixed results. Employers, aware of the likelihood of greater monetary liability in a tort action for wrongful termination, argued that the action was preempted by federal labor law. Some courts held that the wrongful termination action was preempted,55 while others allowed the action to proceed.56 This conflict was settled recently by the United States


55. In Lingle, for example, the collective bargaining agreement provided that grievance and arbitration was the exclusive method for resolving a grievance. Brief for Respondent at 5, Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (No. 87-259) [hereinafter Respondent's Brief].


57. See, e.g., Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984), cert. denied.
Supreme Court in *Lingle*, 57 in which the Court held that state law wrongful discharge actions by unionized employees are not preempted by federal labor law.

A. Some Preemption Background

Three types of preemption can be raised in a wrongful termination action brought by a unionized employee. The first was set out in *San Diego Building Trades Council v. Garmon*. 58 In *Garmon*, the Supreme Court held that the NLRB has primary jurisdiction whenever the conduct at issue is arguably prohibited or arguably protected by section seven of the NLRA, which protects an employee’s right to self-organization and to bargain collectively, or to refrain from such activity. 59 Accordingly, if conduct falls within the “arguably protected or prohibited” arena, both state and federal courts must yield to the exclusive jurisdiction of the NLRB. If a court finds that the NLRB has exclusive jurisdiction, the case is dismissed and the employee’s recovery is limited to back pay and reinstatement as allowed for by statute. While the NLRB has the power “to take such affirmative action including reinstatement of employees . . . as will effectuate the policies of this Act,” 60 this does not include the power to award punitive damages. 61

The second type of labor preemption involves conduct that a state may not regulate even though the conduct is neither arguably protected nor arguably prohibited by section seven of the NLRA. In *Machinists v. Wisconsin Employment Relations Commission* 62 a union refused to work overtime. Although this conduct was not protected or prohibited by section seven, the Supreme Court held that the state could not address this refusal to work because Congress, in passing the NLRA, wanted such conduct “to be left to the free, unregulated interplay of the relative economic strength of management and union.” 63 Accordingly, some conduct may not be regulated by the states because Congress intended it to remain unregulated. Any attempt by the states to regulate such conduct therefore is preempted.

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59. Id.
61. See, e.g., NLRB v. Ellis & Watts Prods., Inc., 297 F.2d 576 (6th Cir. 1962).
Finally, section 301 of the Labor Management Relations Act, which provides a cause of action for breach of a collective bargaining agreement, may preempt a state law claim. Pursuant to Teamsters v. Lucas Flour Co., state and federal courts have concurrent jurisdiction over breach of contract actions. A court, however, must apply federal law in interpreting collective bargaining agreements. A discharged employee may in theory seek redress under section 301 but an employee who does so will find that she first must exhaust remedies provided in the collective bargaining agreement.

Section 301 preemption was perhaps the most frequently litigated and most problematic preemption question in wrongful termination claims. Although section 301 pertains to breach of contract claims, it can also preempt a tort claim for wrongful discharge. In Allis-Chalmers Corp. v. Lueck, the collective bargaining agreement included a disability plan and provided for grievance and arbitration of insurance-related complaints. Instead of filing a grievance, an employee sued both the em-

65. 369 U.S. 95 (1962).
66. J. GETMAN & B. PREGREBIN, supra note 21, at 193-94.

[T]he practical effect of this Maddox-Steelworkers axis is that a union member wishing to sue for breach of his collective bargaining agreement must exhaust the agreement's arbitration procedure. Once the arbitration procedure has run its course, absent one of the narrow exceptions . . . , the courts will defer to the arbitration decision and will not allow suit to proceed under the Steelworkers Trilogy rationale. After exhaustion of such grievance procedure, a subsequent section 301 suit will be dismissed because of Maddox exclusivity principles.

68. The wrongful termination claim could be filed either in state or federal court. If filed in state court, prior to Lingle, it was likely that the defendant would file a removal petition on the grounds that the state law claim was preempted. The question of a federal court's subject matter jurisdiction to hear the preemption claim at that point is beyond the scope of this Article. See, e.g., Graf v. Elgin, Joliet and E. Rwy. Co., 790 F.2d 1341 (7th Cir. 1986); Caterpillar Tractor Co. v. Williams, 786 F.2d 928 (9th Cir. 1986); La Buhn v. Bulkmatic Transp. Co., 644 F. Supp. 942 (N.D. Ill. 1986); see also Comment, Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule, 51 U. CHI. L. REV. 634, 647-48 (1984) (authored by Richard Levy).
ployer and insurer for bad faith handling of claims—a tort under the applicable state law. The Supreme Court did not allow the plaintiff to evade the exhaustion requirements of section 301 by bringing a tort action. The Court held that a tort claim was preempted by section 301 if it was "inextricably intertwined with consideration of the terms of the labor contract." Moreover, "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement between the parties in a labor contract, that claim must either be treated as a section 301 claim or dismissed as preempted by federal labor-contract law." As a result of the test articulated in Allis-Chalmers, each time an employer raised preemption as a defense to a wrongful discharge action by a unionized employee, the court had to analyze the elements of the individual wrongful termination claim on a case by case basis.

The test set forth in Allis-Chalmers proved difficult for lower courts to apply. Some subsequent cases involving wrongful termination claims were held to be preempted while others were not. The nature of the Allis-Chalmers test, in particular the fact-specific focus on the wrongful termination claim, contributed to the resulting confusion. Prior to Lingle, which at least put an end to much of the confusion, the question whether federal labor law preempted a wrongful termination action brought by organized employees divided the courts, sparked debate among commentators, and resulted in chaotic judicial decisions.

70. Id. at 213.

71. Id. at 220 (citation omitted).


73. See, e.g., Taldone, supra note 19; Wheeler & Browne, Federal Preemption of State Wrongful Discharge Actions, 8 INDUS. REL. L. J. 1 (1986) (discussing the possibility that wrongful discharge actions may affect federal labor policy and suggesting a framework for deciding which cases should be preempted and which should not); Zimmerman & Howard-Martin, supra note 19, at 223; Comment, supra note 67; Comment, NLRA Preemption of State Wrongful Discharge Claims, 34 HASTINGS L.J. 635 (1983) (authored by Alan J. Haus); Comment, State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption, 71 CALIF. L. REV. 942 (1983) (authored by Judy Hitchcock). Other articles have examined the question of whether as a matter of policy, as opposed to federal preemption doctrine, unionized employees should be allowed to maintain a cause of action for wrongful termination. See, e.g., Robbins & Norwood, State Wrongful Discharge Law: Are Unionized Employees Covered, 12 EMPLOYEE REL. L. J. 19 (1986); Note, Midgett v. Sackett-Chicago, Inc.: Extension of the Tort of Retaliatory Discharge to Employees Covered by Collective Bargaining Agreements, 16 LOY. U. CHI. L.J. 799 (1985) (authored by John Spitz); Note, Midgett v. Sackett in the Aftermath of Allis-Chalmers: The Impact of Federal Labor Law on Retaliatory Discharge Claims, 6 N. ILL. U.L. REV. 347 (1986) (authored by Bruce Keller).
This debate is illustrated by the disparate outcomes in two decisions handed down by the Ninth Circuit. In *Garibaldi v. Lucky Food Stores*, for example, an employee was discharged for reporting to local shipping authorities that a shipment of milk which he had been ordered to deliver, was spoiled. After the arbitrator found that he was fired for cause, the employee filed a public policy wrongful termination claim. The Ninth Circuit balanced the state and federal interests and held that the wrongful discharge claim was not preempted by section 301. The court identified as the state interest the protection of the health of its citizens rather than the employer/employee relationship. According to the court, the remedy for the wrongfully discharged employee was "in tort, distinct from any contractual remedy an employee might have under the collective bargaining agreement." In *Olguin v. Inspiration Consolidated Copper*, however, the Ninth Circuit held that the employee's claim of wrongful discharge in violation of public policy was preempted by the NLRA. The employee alleged that he was discharged in retaliation for making safety-related complaints. The court tried to distinguish this case from *Garibaldi* on the ground that Olguin's mine safety complaints were governed by a federal statute that the state had little interest in enforcing, "even if that federal law is incorporated, as Olguin suggests, in the state's general public policy." Both *Garibaldi* and *Olguin* illustrate the difficulty courts faced in determining whether a tort claim was preempted.

**B. The Supreme Court's Decision in Lingle**

*Lingle* was decided against this background. Jonna Lingle, the plaintiff, was discharged by Norge for allegedly filing a false workers' compensation claim. The discharge of an employee in retaliation for filing a workers' compensation claim is a frequent fact pattern in wrongful termination cases. When the discharged worker is a union member, the discharge could be a breach of the collective bargaining agreement:

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74. 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 417 U.S. 1099 (1985). Although decided before *Allis-Chalmers*, this case exemplifies the courts' difficulty with these cases.
75. *Garibaldi* reported the milk's condition to his employers who ordered him to deliver the milk. *Garibaldi* instead notified the local health department. *Id.* at 1368.
76. *Id.*
77. *Id.* at 1374.
78. *Id.* at 1375.
79. 740 F.2d 1468 (9th Cir. 1984). Again, this is a pre-*Allis-Chalmers* decision, but it illustrates the difficulty in reconciling these cases.
80. *Id.* at 1475.
81. *See*, e.g., Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Murphy v. City of Topeka, 6
"[s]ince retaliation for filing a workers’ compensation claim . . . does not constitute just cause, such terminations would violate the collective bargaining agreement."

Because a discharge resulting from the filing of a worker's compensation claim also may be a violation of state public policy, it can serve as the basis for both a state law wrongful discharge claim and a grievance pursuant to a collective bargaining agreement.

The plaintiff in *Lingle* proceeded with a grievance, ultimately prevailed in arbitration, and was awarded reinstatement and full back pay. She also filed a state court action alleging wrongful discharge in violation of state public policy. Others in similar situations have chosen to bypass the grievance and arbitration procedure entirely and go directly to court to allege that their discharge is in violation of the state’s public policy.

In response to the type of claim exemplified in *Lingle*, employers, seeking to limit recovery to reinstatement and back pay, have argued that

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the state law action is preempted. Lingle's employer argued that section 301 of the Labor Management Relations Act preempted her tort claim. The Supreme Court held that Lingle's state law claim was not preempted after applying the following test: "[I]f the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is preempted . . . ."86

In reaching this decision the Court noted that in order to prove retaliatory discharge under Illinois law, Lingle had to establish that her employer's motive in discharging her was to deter her from exercising her rights under the workers' compensation statute. According to the Court, this analysis does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state law remedy in this case is "independent" of the collective bargaining agreement in the sense of "independent" that matters for 301 preemption purposes: resolution of the state-law claim does not require construing the collective bargaining agreement.87

The Supreme Court, in a unanimous opinion authored by Justice Stevens, held that a court could determine whether the employer's actions in discharging Lingle constituted a retaliatory discharge under state law without having to interpret the just cause provision of Lingle's collective bargaining agreement. The Court stated that the retaliatory discharge claim was "independent" of the collective bargaining agreement and that preemption was inappropriate.88

The court of appeals in Lingle defined "independent" quite differently from the Supreme Court. For the court of appeals, the just cause provision of the collective bargaining agreement might have prohibited the retaliatory discharge. Moreover, because deciding the retaliatory discharge claim would involve the same facts as a determination whether the collective bargaining agreement had been violated, the court of appeals held that the state law claim was not independent of the collective bargaining agreement and, therefore, preemption was appropriate.89 The Supreme Court explicitly rejected the appellate court's definition of "independent."90

86. 486 U.S. at 405-06.
87. Id. at 407.
88. Id. at 410.
Although *Lingle* did not resolve all preemption issues, it did hold that when a unionized worker is discharged in violation of a state statute, the employee's tort suit for wrongful termination in violation of state public policy is not preempted by federal labor law. The Supreme Court's holding in *Lingle* acknowledges that unionized employees may seek relief under their collective bargaining agreements as well as state tort law. Yet, this perceived victory for labor may have seriously undermined the group interest fostered by the collective process of our national labor policy. The preemption question, as raised in *Lingle*, focused almost exclusively on the rights of the individual to pursue an individual claim and did not consider the underlying effect such wrongful termination actions would have on unionization.

C. Arguments For and Against Preemption

Prior to the Supreme Court's decision in *Lingle*, the lines were drawn between those who argued that wrongful discharge claims by unionized employees should be allowed (Anti-preemptionists) and those who argued that state law wrongful discharge claims by unionized employees should not be allowed (Pro-preemptionists).

(1) Arguments Against Preemption: Why Unionized Employees Should Be Allowed to Bring Wrongful Discharge Claims

According to the Anti-preemptionists, limiting organized employees to the remedies provided in their collective bargaining agreements produces an anomalous result. If unionized employees are prohibited from pursuing wrongful termination claims, they will have less protection from arbitrary discharge, in terms of allowable remedies, than their at-will counterparts. Organized workers traditionally receive only reinstatement and back pay while at-will employees have the possibility of damages for pain and suffering and mental anguish as well as punitive damages. Ultimately, prohibiting unionized employees from pursuing wrongful discharge claims has the effect of providing less protection to

91. Preemption questions left open after *Lingle* include whether a wrongful discharge claim by a unionized employee based on a breach of the implied covenant of good faith and fair dealing is preempted and whether a unionized employee may bring a wrongful discharge claim for breach of an implied contract. Moreover, the preemption questions raised in *Garmon* and *Machinists* remain open after *Lingle*. *Lingle* does appear, however, to have ended the case-by-case approach to public policy wrongful discharge claims by unionized employees at least when the tort claims are based on a state statute.

92. 486 U.S. at 407. The state claim will be preempted only in those instances in which resolution of the state law claim depends on interpretation of the collective bargaining agreement.
unionized employees than to at-will employees. Unionized employees literally are penalized for being represented by a union.

This anomaly can be rectified by allowing unionized employees to proceed with state law actions for wrongful termination either in place of or in addition to the grievance and arbitration procedures specified in their collective bargaining agreements. Anti-preemptionists argue that unionized employees should not be limited to the remedies provided for in their collective bargaining agreements because such remedies are incomplete.

In *Midgett v. Sackett-Chicago, Inc.*, for example, the Illinois Supreme Court extended the tort of retaliatory discharge to employees covered by a collective bargaining agreement. The majority relied on two policy rationales. First, the court held that unionized employees must be allowed to sue in tort because remedies under their collective bargaining agreement were inadequate:

> [T]here is no reason to afford a tort remedy to at-will employees but to limit union members to contractual remedies under their collective bargaining agreements. Generally, if a union employee's grievance goes to arbitration and the arbitrator does not find just cause for the discharge, the remedy will be simply job reinstatement and full back pay.

In addition to providing adequate relief to unionized employees (those who traditionally are confined to grievance and arbitration remedies) the Illinois Court wanted to assure that employers, whether unionized or not, are subject to sanctions for violating the state's public policy. The Court noted:

> If there is no possibility that an employer can be liable in punitive damages . . ., there is no available sanction against a violator of an important public policy of this State. It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee.

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96. *Id.* at 150, 473 N.E.2d at 1283-84.
The public policy against retaliatory discharges applies with equal force in both situations.\(^{97}\)

Finally, in addition to these concerns, Anti-preemptionists argue that precluding unionized employees from pursuing wrongful discharge claims hurts organized labor. They urge that unionized workers must be allowed to bring wrongful termination claims or employees quickly will learn that by electing a union, they sacrifice the possibility of punitive and other compensatory damages and, in fact, the right to bring state law actions for wrongful discharge. Although employees may hear of the advantages of organization such as the collective power of the union, the higher wages that accompany unionization, and the fact that the grievance and arbitration process provides a quicker and less costly remedy for a wrongful termination, these advantages may pale in comparison to the large damage awards possible in a state action for wrongful termination. At some point, employees are likely to perceive that the sacrifice of their common-law rights is a strong incentive not to unionize.\(^{98}\)

Anti-preemptionists, including organized labor, argue that because preemption limits unionized employees to contractual remedies while making tort damages available to their nonunionized counterparts, preemption would cause a further decline in unionization.\(^{99}\) Preempting all wrongful termination claims prevents unionized employees from pursuing a common-law tort action, the remedy they perceive as most effective for arbitrary discharge. Organized employees might, therefore, decide against unionization.\(^{100}\)

Anti-preemptionists thus have three concerns underlying their position that unionized employees should be allowed to pursue state law

\(^{97}\) Id. at 150, 473 N.E.2d at 1284.

\(^{98}\) Employees also would have an incentive to decertify an already existing union or to seek employment in a non-unionized setting or one not covered by a collective bargaining agreement.

\(^{99}\) Organized labor's position was generally anti-preemption. See, e.g., AFL-CIO Brief, supra note 94. The Union's argument in Lingle was essentially that: (1) the state law at issue did not burden the collective bargaining process but rather merely set up minimum rights applicable to all employees; and (2) the presumption favoring arbitration did not apply because the case did not involve a dispute concerning the collective bargaining agreement.

Unions were in an unenviable position during the preemption debate. If they argued in favor of preemption, it would seem that they did not want their members to have adequate protection or enhanced damage awards. Politically, it would be untenable for a union to appear in favor of preemption. However, it also may have been politically unwise, at least in the short run, for unions, already in a state of serious decline, to take a position against preemption. The ready availability of enhanced damage awards in wrongful termination cases may make unionization appear superfluous and, in the long run, cause a further decline in unionization.

\(^{100}\) Organized employees could decide to decertify an elected union. Unorganized employees might decide to vote "no union" on this basis.
wrongful discharge claims in addition to remedies provided for in collective bargaining agreements, including: adequate relief for individual unionized employees, sanctions against employers who violate state public policy, and the possible negative effect on organized labor.

(2) Arguments for Preemption: Why Unionized Employees Should Not Be Allowed to Bring Wrongful Discharge Actions

At first glance it might appear that allowing unionized employees to pursue wrongful termination claims in addition to or instead of their contractual remedies would benefit unionized workers and consequently unions. Pro-preemptionists who argue that unionized employees should not be allowed to pursue wrongful discharge claims, however, assert that permitting unionized employees to seek remedies beyond those provided in their collective bargaining agreements would have a negative effect on organized labor.¹⁰¹ According to the Pro-preemptionist view, the ability to sidestep the bargained for remedies would weaken a union's overall bargaining power and adversely affect management-union relationships. Allowing unionized employees to disregard the collective bargaining agreement also would have a negative effect on the use of arbitration and would undermine that process.¹⁰²

Although this argument was made to the Supreme Court in *Lingle*, the Court did not address it.¹⁰³ The Court was concerned with keeping the "interpretation of collective-bargaining agreements ... 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."¹⁰⁴ Although the *Lingle* Court did not explain why it felt arbitrators should have primary responsibility for interpreting collective bargaining agreements, it presumably was concerned with avoiding conflicting interpretations of collective bargaining agreements by arbitrators and judges. The Court failed to note, however, that avoiding conflicting interpretations is not the only virtue of preemption. From a Pro-preemptionist standpoint, the Supreme Court ne-

¹⁰¹. Wheeler & Browne, *supra* note 73, at 30-32 (insufficient weight has been given to the principles of preemption, and except in narrowly defined circumstances, causes of action based upon public policy should be precluded where an employee has access to the grievance and arbitration procedures of a collective bargaining agreement, regardless of whether concerted activity is involved); Weeks, *supra* note 42, at 690; see also Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) (Moran, J., dissenting), *appeal dismissed*, 483 U.S. 1012 (1987).

¹⁰². Midgett, 105 Ill. 2d at 153, 473 N.E.2d at 1285 (Moran, J., dissenting).


glected the fact that preemption of wrongful discharge claims by unionized workers would help maintain the primacy of the arbitral process. Allowing unionized employees to pursue a cause of action that permits recovery of damages far in excess of those available through arbitration might undermine the arbitral process as much as conflicting interpretations.105

More than twenty years before Lingle, however, in Republic Steel v. Maddox,106 the Supreme Court recognized that an employee could not seek a civil remedy to the exclusion of the grievance procedure. In an opinion written by Justice Harlan, the Court held that a unionized employee could not bypass the grievance procedure specified in her collective bargaining agreement. Justice Harlan stated:

A contrary rule which would permit an individual employee to completely sidestep available grievance procedures has little to commend it. . . . [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."107

In Republic Steel, the Supreme Court recognized the importance to employers and unions of arbitration as the exclusive method of dispute resolution.

For those who advocate the preemption of all wrongful termination actions by unionized employees, the reasoning of Republic Steel is applicable today. If unjustly terminated employees routinely are allowed to bypass their bargained for remedies, these remedies become meaningless to both employees and employers. Employees can engage in forum shopping, deciding between arbitration and court, or try the arbitration process and then get a second bite of the apple by filing a tort action.108 Employers, as a result of Lingle, have no reason to agree to or cooperate

105. The Court did note that unionized employees are allowed to bring section 1983 and Title VII claims in addition to grievance and arbitration procedures. Id. at 412. The effect of this on organized labor is unknown. It may be that the combination of allowing unionized employees to bring section 1983, Title VII, and public policy claims has troubling implications for organized labor.
107. Id. at 653 (quoting Teamsters Local v. Lucas Flower Co., 369 U.S. 95, 103 (1962)).
with arbitration procedures if an employee can, at her discretion, sidestep arbitration and file a tort claim. As succinctly argued to the Supreme Court in *Lingle*, wrongful discharge claims must be preempted or 
 employers 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 employees' 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.¹⁰⁹

Pro-preemptionists therefore argue that *Lingle* undermines the effectiveness of arbitration as the exclusive method of dispute resolution.

Pro-preemptionists assert that allowing an alternative to collective bargaining ultimately will weaken the union's negotiating position. They argue that "[a]ccording every grievant an opportunity to relitigate the merits of his claim could undermine the grievance procedure."¹¹⁰ If employees can ignore arbitration procedures, employers may refuse to include arbitration provisions in collective bargaining agreements, ultimately undermining the entire process.

In addition, preemption of all wrongful termination claims by unionized employees would avoid any possible conflict between federal labor law and state policy. It would insure that state law does not interfere with the goal of a uniform federal law, which was, after all, Congress' intent in passing the NLRA.¹¹¹ Finally, preemption would maintain the congressional preference¹¹² for arbitration of industrial disputes by forcing unionized workers to rely on remedies provided in their collective bargaining agreements. This approach is preferred because in the words of two commentators, "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."¹¹³

The Pro-preemptionists, therefore, take the position that allowing unionized employees to pursue state law remedies as an alternative to

their collectively bargained remedies ultimately would weaken the arbitral process. According to the Pro-preemptionists, unless the wrongful termination claims of unionized employees are preempted, there will be a negative effect on the primacy of arbitration that will, in turn, affect organized labor.

III. For Organized Labor, Either Answer to the Preemption Question Will Hurt

As discussed above, both Anti-preemptionists and Pro-preemptionists assert that their opponents’ position would hurt organized labor. The Anti-preemptionists argue that unionized employees should be allowed to pursue state law remedies or they will be less protected from arbitrary discharge, in terms of remedies, than their at-will counterparts. Pro-preemptionists argue that permitting unionized employees to pursue state law wrongful discharge claims will undermine the arbitral process and collective bargaining system.

Courts and commentators fail to realize that, in essence, both sides are correct. Either answer to the preemption question could hurt organized labor because ultimately it is the existence of wrongful discharge actions that threatens organized labor. Regardless of whether or not the wrongful discharge claims of unionized employees are preempted, unionized employees now know that alternative protection from arbitrary discharge is available under the common law and that the common law provides greater monetary relief than collectively bargained for remedies. If wrongful discharge claims by organized employees are preempted, organized employees will not be able to recover extra-contractual damages and will realize that the common law provides a better remedy than their collective bargaining agreements. If, on the other hand, wrongful discharge claims by organized employees are not preempted, employees’ incentive to rely on grievance and arbitration is decreased because of the unequal remedy structure.

For organized labor, therefore, either answer to the preemption question has potentially negative implications. In fact, the preemption question is merely a red herring that focuses attention on the individual and diverts attention from the group interest inherent in our collective bargaining system. The Supreme Court’s test focuses on facts pleaded by the individual plaintiff: “If resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement between the par-
ties in a labor contract, that claim must either be treated as a section 301 claim or dismissed as preempted."\textsuperscript{114}

Ultimately, the preemption approach to the question whether unionized employees should be allowed to pursue wrongful termination claims in addition to grievance and arbitration does not even consider organized labor as a whole. By its very nature, a preemption approach to the wrongful discharge of individuals does not consider the idea of collective good that underlies unionization. The test does not consider the collective bargaining agreement or the union, or even employer-union relations. In \textit{Lingle}, for example, the Court held that the plaintiff’s retaliatory discharge claim involved “purely factual questions pertaining to the conduct of the employee and the conduct and motivation of the employer.”\textsuperscript{115} Accordingly, the claim was not preempted because resolution of the facts did “not turn on the meaning of any provision of a collective-bargaining agreement.”\textsuperscript{116} The focus is on the facts of the individual claim and whether resolution of that claim requires interpretation of a particular collective bargaining agreement. The impact on unions of resolving whether an individual’s claim is or is not preempted is simply not a factor.

A. The Existence of Wrongful Discharge Actions Effects Organized Labor

The preemption approach, with its inherent focus on the individual, draws attention away from troubling policy questions. Although necessary to protect at-will employees, wrongful termination actions are being brought by unionized employees. It is time to focus on the effect of judicial recognition of a cause of action for wrongful termination on the collective, organized labor.

\textit{(1) Why Workers Join Unions}

It is important to understand why workers unionize in order to understand the negative implications that judicial recognition of wrongful discharge actions have on organized labor. Employees do not join unions simply to get higher wages.\textsuperscript{117} In large part, workers join unions for job security.

In industrial unions, many workers join because of some incident in the plant in which they experienced or witnessed what they considered to be unfair or arbitrary action by a foreman or supervisor. The possi-

\begin{itemize}
\item \textsuperscript{114} Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985).
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} A. Rees, \textit{The Economics of Trade Unions} 25 (2d ed. 1977).
\end{itemize}
bility of limiting or redressing such action through the grievance procedure is thus a primary motive for union membership and support of the organization. In a study of a large local industrial union in which 114 local leaders, active members, and rank and file members were interviewed about their reasons for joining the union, such experiences were frequently mentioned, though not one worker mentioned wages.118

This desire for job security has not changed significantly over the years. At a recent labor law conference, a prominent management attorney remarked that "the most persuasive argument used by unions . . . is that employees need protection against management actions that are arbitrary or inequitable."119 Unionization and the grievance and arbitration process that usually follows do provide job security. Grievance and arbitration is an effective mechanism for employees to resolve their contested discharges.

Grievance and arbitration offer two main advantages over litigation. Arbitrating a discharge is far quicker than litigating a wrongful termination claim in court. The average time elapsed between requesting an arbitrator and an award is about 225 days120 compared with about three years from the date of filing to trial.121 The time between discharge and an adjudication of the merits of that discharge is important to employees for two reasons. First, the unemployed plaintiff is not receiving a paycheck and the economic impact of the time unemployed is readily apparent. In addition, the discharge itself may have an emotional impact on the plaintiff, especially if the plaintiff is unemployed for a long period of time. One plaintiff's attorney remarked that the long delays involved in getting to trial hurt individual employees who may be "slipping 'deeper and deeper in debt or depression from which they may never recover, irrespective of the results.'"122

Arbitration also is far less expensive than litigation. In 1985, the average per diem charge for an arbitrator was $317 and the average total

118. Id. at 26 (citation omitted).
120. 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.") [hereinafter Presidential Advisory Committee].
bill was $1200. In stark contrast, the average wrongful termination action costs a defendant about $80,000 in attorneys' fees and expenses.

The grievance and arbitration procedure commonly found in collective bargaining agreements therefore provides an employee a mechanism to ensure some measure of job security. In addition, for employees deciding whether to unionize, the protection afforded by grievance and arbitration is a strong incentive to organize.

(2) The Decline in Unionization

Despite the promise of job security offered by organization, unionization has declined dramatically in the last thirty years. In the 1950s, at least one-third of all nonagricultural workers were organized. By 1980, that percentage fell to less than one-quarter. The cause of this ten point decline is the subject of much speculation, but one reason may be that workers now get some of the advantages of union representation without unionizing.

Economists Neumann and Rissmann postulate that the "provision of certain social welfare benefits by government substitutes for the private provision by unions, thereby reducing the attractiveness of union membership." Empirical studies support their theory. When the NLRA was originally enacted in 1935 there were virtually no statutory protections for at-will employees. In the years following the passage of the NLRA numerous other social welfare statutes were enacted, many of them to provide security to workers. Such legislation includes the Fair Labor Standards Act of 1938 (providing minimum wages, mandatory overtime, and prohibiting oppressive child labor), the Social Security Act of 1935 (providing unemployment, retirement, and disability benefits), state unemployment insurance statutes, state worker compensation

123. Presidential Advisory Committee, supra note 120, at A-10.
124. LEGAL AND ECONOMIC CONSEQUENCES, supra note 121, at 37.
125. See supra note 5 and accompanying text.
126. Neumann & Rissmann, supra note 6, at 175. But see Hayserman & Maranto, The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions to the Termination-At-Will Doctrine Hurt Unions?, 72 MARQ. L. REV. 317 (1989). This Article concludes that wrongful termination was not having a significant effect on union representation elections (as opposed to union membership which was studied by Neumann & Rissmann) as of 1983, the last date of their statistics. As noted supra note 6, there have been many changes in wrongful termination since 1982 and in employees' perceptions of the existence of wrongful termination actions. In addition, the study does not consider the effect of preemption and most significantly, the Supreme Court's decision in Lingle that wrongful termination actions by unionized employees are not preempted.
statutes, the Civil Rights Act of 1964 (prohibiting discrimination in employment), and the Occupational Safety and Health Act of 1970 (providing safety standards).

Although necessary to provide some minimum level of protection for at-will workers, this legislation may have hindered the growth of unions. "It is ironic that while the bulk of the legislative agenda of the labor movement—social insurance, minimum wages, safety and health, and full employment—primarily benefits nonunion workers, these workers do not identify with the unions." Commentators have noted that workers are more likely to join unions when they are dissatisfied with working conditions and believe that the union is their only hope. The legislation enacted to protect employees may actually have reduced the attractiveness of organization because the legislation was perceived as a substitute for unionization. Prior to 1970, for example, employees faced with unsafe working conditions could seek protection either through state laws that were largely inadequate or from unions. The passage of the Occupational Safety and Health Act of 1970 offered an alternative to unions by providing employees with a mechanism for complaining about job safety even without a union. Moreover, while unions initially were the source for some standard of decent wages, the increasing coverage of the Fair Labor Standards Act of 1938 has extended minimum wages to an increasing number of workers.

Exceptions to the doctrine of employment at will in the form of judicial recognition of wrongful termination actions may be viewed as the provision of a social welfare benefit by government. Consequently, unionization may be affected by wrongful termination actions in much the same way that it is affected by the provision of other social welfare benefits.

As discussed above, it appears at first glance that allowing unionized employees to pursue wrongful termination claims in addition to or instead of their contractual remedies would benefit individual unionized workers and, therefore, unions. In the long run this reasoning is faulty,

133. Unions in Crisis and Beyond, Perspectives from Six Countries 49 (R. Edwards, P. Garonna & R. Todtling, eds. 1986).
however, because it fails to consider that the existence of the tort action will make unionization appear superfluous to employees concerned with job security. Because employees unionize primarily to obtain the benefit of job security,\textsuperscript{137} the existence of a wrongful termination action will be perceived as a substitute for unionization. Moreover, because the monetary remedies available in a wrongful discharge case exceed those recoverable under a collective bargaining agreement, wrongful discharge actions may appear preferable to unionization. From the employee's perspective, union dues are unnecessary if the common law provides job security that is as good as or better than that provided by unionization. Therefore, while the availability of wrongful termination actions may advantage individual employees who are wrongfully discharged, it will ultimately disadvantage the collective groups of employees that benefit from unionization.

(3) Why Unionization Matters

Some critics of organized labor argue that unions have outlived all usefulness.\textsuperscript{138} Union proponents, however, assert that the labor vision embodied in the Wagner Act\textsuperscript{139} is still valid today.\textsuperscript{140} As noted by A.H. Raskin, former Chief Labor Correspondent for the \textit{New York Times}, unions retain their validity as "a champion of the interests of wage earners and as a social counterweight to the power of business and finance."\textsuperscript{141}

Unionization also continues to provide collective strength. According to Judge Mikva, "[t]he explicit message of the Act was that workers needed protection because, individually, they could not protect themselves."\textsuperscript{142} Workers still need unions and collective bargaining today. Wrongful termination actions do not replace the strength of the collective bargaining process. As Paul Weiler noted, "[t]he central premise of

\begin{footnotes}
\item[137.] See supra notes 117-18 and accompanying text.
\item[138.] Abraham, \textit{Individual Autonomy and Collective Empowerment in Labor Law: Union Resignations and Strike Breaking in the New Economy}, 63 N.Y.U. L. REV. 1268, 1298 (1989). "In short, many view unions as 'rent seeking' cartels that establish monopoly wages, often at the expense of consumers and other employees, and stultify the entire economy. They are dysfunctional, often corrupt and crass special interests." \textit{Id.} (citing, \textit{e.g.}, R. LEKACHMAN, \textsc{Greed is Not Enough: Reaganomics} 1-20 (1984); Posner, \textit{Some Economics of Labor Law}, 51 U. CHI. L. REV. 988, 999-1011 (1982)).
\item[140.] Weiler, \textit{supra} note 4, at 1822-27.
\end{footnotes}
the NLRA is that purely individual dealings between employer and employee will not produce fair and decent employment conditions.\textsuperscript{143} While wrongful termination actions provide some protection for at-will employees, they are not a substitute for unionization. Wrongful termination actions focus on wrongs done to an individual employee. Employer wrongdoing is corrected after the fact, and then only on a case by case basis. The collective strength of employees is necessary to ensure decent working conditions.

The possibility of unionization may limit employer power over employees. Without the threat of unionization, an employer has little incentive to improve working conditions. Getman and Kohler have pointed out that "if employees want to trade their right to bargain collectively (and many do), they are in a much stronger position when they have a legal right to secure union representation if they are dissatisfied with what the employer has provided."\textsuperscript{144}

Contrary to the stereotype that unionization hurts the employer, unionization may actually help the employer. As support for legislation allowing nonprofit hospital workers to unionize, Senator Cranston introduced evidence of lower turnover and better job stability and security at two hospitals that unionized.\textsuperscript{145} In fact, "[r]ecent empirical research indicates that . . . [e]mployees who work under a collective bargaining agreement may actually be more productive than those employed in an otherwise comparable nonunion environment."\textsuperscript{146} It is unlikely that this result would follow individual wrongful termination claims.

It appears, therefore, that unionization may help both employees and employers. Unionization provides collective strength for employees and may result in a more efficient workplace for the employer.

According to Clyde Summers, the two basic premises underlying our national labor policy are that workers need protection and that collective action is the best way to protect the individual.\textsuperscript{147} Summers points out that collective bargaining was meant to equalize bargaining power and provide industrial democracy with a minimal level of governmental control.\textsuperscript{148} He notes that "[c]ollective bargaining was encouraged as a substitute for governmental control; it was a private process con-

\textsuperscript{143} Weiler, supra note 5, at 364.
\textsuperscript{146} Weiler, supra note 4, at 1825.
\textsuperscript{148} Id. at 13.
structed to serve public purposes for which the law was ultimately responsible.”149 One advantage of the collective bargaining process is that there is less governmental involvement than in wrongful termination actions. The collective bargaining process, with its private ordering, does not require recourse to the judicial system each time an individual feels he or she was wronged. Pursuant to the grievance and arbitration provision, the employer and employee go through the progressive grievance system rather than resorting to the courts or an administrative agency. This maintains the dispute as a private one and saves judicial resources.

The collective bargaining system therefore is more economically efficient than wrongful termination litigation. Lee Modjeska has recognized that increasing judicial erosion of the employment at will doctrine... cannot supplant this system of workplace self-government. Formal, costly, cumbersome, and lengthy court litigation is no substitute for the informal, inexpensive, simple, and expeditious relief available under the grievance and arbitration procedure contained in most collective bargaining agreements.150

Although unionization may be declining, there is still much to be said in its favor. It benefits employees by providing collective strength while affording each individual an efficient means to resolve grievances. Although the stereotype may be that all employers dislike unions, unions actually may provide some benefits to employers. Unionization at least provides an employer with an efficient means to resolve employee disputes.

IV. A Solution

Union affiliation in this country is declining for a multitude of reasons including the economy,151 the inadequacy of the remedies provided by the NLRA,152 and the provision of social welfare benefits by government.153 Unions may be in such a precarious state that we, as a society, may decide that we do not want to risk further decline.

To alleviate the effect that recognition of wrongful termination actions may have on organized labor, or to negate even the possibility that wrongful termination actions will weaken organized labor further, the

149. Id. at 13-14; Getman & Kohler, supra note 144, at 1432 (also proposing collective bargaining as substitute for governmental control).
150. Modjeska, supra note 145, at 1015.
152. Weiler, supra note 4.
remedies available under collective bargaining agreements must be equalized with those available at common law. Employees covered by collective bargaining agreements should be allowed to recover extra-contractual damages in arbitration. Equalization of remedies would eliminate the incentive for unionized employees to bypass their collective bargaining agreements in favor of the common law. If unionized employees are afforded the same remedies as their at-will counterparts, the part of the decline in union membership that is caused by judicial recognition of wrongful termination actions will be eliminated. Equalizing remedies will maintain the wrongful discharge protection of at-will employees, while supporting unionization. The collective interest of unionization will not be sacrificed to protect individual at-will employees.

There are at least two ways to equalize remedies. First, legislation could be enacted changing the common law so that extra-contractual remedies would not be available in wrongful termination actions. Second, extra-contractual remedies could be allowed in arbitration of disputed discharges.

A. Eliminating Extra-Contractual Remedies from the Common Law

Remedies recoverable under the common law could be equalized with those available in arbitration by restricting or totally eliminating extra-contractual remedies currently recoverable in wrongful discharge actions. States or the federal government could enact statutes restricting the recovery available in wrongful termination actions to reinstatement and back pay and eliminating extra-contractual remedies such as punitive damages. In addition to these changes, commentators such as Theodore St. Antoine and Clyde Summers have proposed legislation that would provide for arbitration of unjust terminations of at-will employees. These statutory arbitration proposals typically recommend a “just cause” dismissal standard for all employees with a grievance and arbitration model borrowed from the collective bargaining context. Recovery would be limited to reinstatement and back pay.

154. Montana, for example, passed a “Wrongful Discharge Act” that limits recovery to four years lost wages and excludes recovery of damages for emotional distress. This statute also excludes an award of punitive damages except when the employer has acted fraudulently or with malice. MONT. CODE ANN. § 39-2-901 (1987).


156. St. Antoine, supra note 155; Summers, supra note 26; see also Hill, Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal, 3 N. ILL. U. L. REV. 111 (1982); Note, Employment at Will: Just Cause Protection Through Mandatory Arbi-
(1) The Statutory Arbitration Scheme

According to the statutory proposals, at-will employees would have access to "the same arbitration procedures, have their cases heard by some of the same arbitrators, and be judged by essentially the same standards."\(^{157}\) Although the scope of the proposed statutes and specific issues such as who bears the cost, what employers and employees are covered, and whether the statute should cover employees already covered by a collective bargaining agreement still need to be resolved, commentators, like Summers for example, suggest some solutions.\(^{158}\)

Employers would welcome Summers’s and St. Antoine’s proposals because they limit liability. Summers’s proposed arbitration scheme not only limits employer liability to back pay, but also reduces litigation costs. Because statutory arbitration legislation presumably would provide the exclusive remedy for wrongful termination, it would limit litigation costs and avoid litigation in multiple forums.

Moreover, Summers’s and St. Antoine’s proposals do provide some minimal level of protection for at-will employees. Litigation is expensive, and not all wrongfully discharged employees can afford to sue their former employers. Because arbitration is less expensive than litigation, these proposals would make a remedy available to more employees.

(2) The Problems with the Statutory Arbitration Scheme

When originally advanced in 1976, Summers’ proposal would have provided some measure of job security for at-will employees. It is no longer a viable solution, however, when viewed from the state’s or employee’s viewpoint. At-will employees who are successful in wrongful termination cases in court are likely to receive much more in the way of compensation than back pay.\(^{159}\) At-will employees, the plaintiffs’ employment bar, and organized labor\(^{160}\) therefore are likely to oppose such

\(^{157}\) Summers, supra note 26, at 523. Some proponents of a just cause dismissal standard suggest that the remedies under their proposed statutes be the same as typical remedies pursuant to collective bargaining agreements, i.e., reinstatement and back pay. See id. at 531. Cf. Note, supra note 156, at 170 (“From the employee’s view, the fundamental trade off is a limited damage remedy in exchange for broad coverage and speedy dispute resolution.”).

\(^{158}\) Summers, supra note 26, at 524-31.

\(^{159}\) One study of 120 jury trials in California between 1980 and 1986 revealed that the “average award, including defense judgments, was $436,626. The average award, excluding defense judgments, was $646,855. For these forty trials, excluding defense judgments, the average punitive damages award was $532,170.” J. DERTOZOS, supra note 49.

While the proposed arbitration statutes provide for reinstatement, which is not typically available in wrongful termination actions, it is unlikely that at-will employees would be willing to give up in exchange for reinstatement the damage bonanza that currently is available at common law. Moreover, in the organized labor setting,

\[ \text{the reinstatement has prove[n] to be far less effective in practice than in theory. It is one thing for the NLRB to calculate the amount of wages lost and see that this sum is paid to the discharged employee. It is quite another thing for an outside agency to try to reconstruct an enduring employment relationship.} \]

The relationship between employee and employer may be quite complex. While some employees might seek reinstatement, recreating the employment relationship may not be a realistic remedy.

Awarding reinstatement and back pay without at least the possibility of compensatory and punitive damages does not vindicate the state's interest in enforcing its public policy, one of the stated reasons for recognizing a cause of action for wrongful termination and for awarding punitive damages in the first place. When reinstatement and back pay are the only remedies available, an employer may find it more economical to terminate an employee than to comply with the state's public policy. Consider, for example, a truck driver who discovers that the milk she is about to deliver is spoiled. Assume that the employer incurs a cost of $10,000 if the milk is not delivered and that the driver earns $1,000 per week. It may be cheaper for the employer to fire the truck driver than to dispose of the milk properly. Not delivering the milk will cost the employer $10,000. If the driver is fired and the discharged employee is entitled only to back pay, it will cost the employer only $1,000 per week—it will not cost the employer $10,000 until the employee is out of work for ten weeks. In fact, if the employee quickly finds comparable work, the discharge may cost the employer only trivial transactional costs. This may, therefore, provide the employer with an incentive to fire the employee rather than to comply with the state's public policy regarding healthy milk.

161. See, e.g., Summers, supra note 26, at 531.


163. A. Cox, O. Bok & R. Gorman, supra note 47, at 264. The authors discuss two studies that reveal that only about 40% of employees who were offered their jobs back took them and of the employees who did go back, nearly 80% were gone within one or two years. Most blamed their departure on vindictive treatment by the employer.

164. Love, supra note 33, at 587.

165. See supra notes 35-40 and accompanying text.
Under a statutory arbitration scheme for at-will employees, unionized employees no longer would feel that their remedies are inadequate as compared to those afforded under the common law. Indeed, the remedies provided to both unionized and at-will workers would be inadequate. Equalization in this manner would eliminate the adverse effect of wrongful termination actions on unionization, but only to the detriment of at-will employees and the enforcement of state public policy.

Besides the practical and political difficulties of even enacting such legislation, statutory arbitration may result in more wrongfully discharged employees. Recently Summers acknowledged that while protection of at-will employees must be affordable and broadly available, the remedy must be sufficient to deter future violations by the employer. Summers recognized that his proposal to compensate only for economic loss can not fully resolve the dilemma and, in fact, that "there may be no fully satisfactory solution."166

The statutory arbitration proposals are, therefore, subject to the same criticism that Paul Weiler forcefully applies to the NLRA—the remedy is too weak to encourage compliance. Weiler faults the current remedial provisions of the NLRA and points out that, unless there are stronger sanctions available against employers who violate the NLRA, there is little to encourage employers to comply with that Act.167 Similarly, if recovery in wrongful discharge actions is limited to back pay and reinstatement, employers have little or no incentive to follow the state's public policy. The current availability of large damage awards in a common-law tort action not only encourages employers to scrutinize their discharge decisions but also encourages employees to pursue litigation and enforce state public policy.

B. Extra-Contractual Damages in Arbitration

One alternative that has not been explored adequately would require equalization of the remedies available to at-will and unionized employees by providing for enhanced damage awards under the NLRA and in arbitration. Under this proposal, by amending the NLRA and by permitting arbitrators to award compensatory and punitive damages, employees covered by collective bargaining agreements would be afforded the op-


167. Weiler would change the current process used in union representation elections and argues that unless this is done, changing the remedies provided for by the NLRA would be ineffective. Weiler, supra note 4, at 1787-1803.
portunity to recover tort-like damages through their collective bargain-
ing agreements.

(1) Unionized Workers Are Entitled to Punitive Damages

Any argument that unionized employees are not entitled to extra-contractual damages because they get the benefits of unionization is unpersuasive. This argument suggests that while unionized employees get benefits from unionization, at-will employees get different benefits such as extra-contractual damages and job security from not unionizing. There are three problems with this view. First, it characterizes unionization as a gift to workers. Under this analysis, workers are entitled only to some predetermined amount and asking for more is greedy. It presupposes that unionization is a benefit bestowed by a benevolent employer and implicitly denies that unionization is a congressionally mandated right. Second, it sets the remedies as of the time the NLRA was originally enacted and does not allow for responses to changes in society, economics, or law. In light of the rapid expansion of employment law, labor law must be allowed to respond. Finally, under Lingle, unionized employees can get extra-contractual damages if they bring a separate tort action. This system benefits no one. After Lingle, the employer has to litigate in multiple forums, the employee must find an attorney for the tort action and wait years for the enhanced damage award, and unions may soon be viewed as superfluous. A satisfactory alternative to multiple forum litigation must exist. This satisfactory alternative should be accessible to employees, provide remedies adequate to compensate employees, and encourage employer compliance. Accordingly, extra-contractual damages should be available in arbitration.

Some commentators have expressed concern regarding the increase in awards of punitive and compensatory damages in tort actions generally.\(^{168}\) Others, however, have argued the need for punitive damages because plaintiffs are not adequately compensated for breach of contract.\(^{169}\)

The undercompensation of unionized plaintiffs under our current labor

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169. D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 3.9, at 205 (1973) ("[W]e must remember the reasons for punitive and compensatory damages. These reasons include punishing the defendant, deterring the defendant, deterring others, preserving the peace, inducing private law enforcement, compensating victims for otherwise uncompensable losses and paying the plaintiff’s attorneys’ fees."); Sebert, Pecuniary and Nonpecuniary Damages In Actions
law has become particularly acute since the rise of wrongful discharge litigation. Moreover, concerns over the cost of wrongful termination may be more imagined than real.\(^{170}\)

\(\text{(2) Employers Would Agree to the Award in Arbitration}\)

In order to receive the primary benefits of arbitration, namely speed and low cost, employers are likely to agree to the availability of extra-contractual remedies. Employers also would rather have their potential liability judged by an arbitrator who is experienced in the industry, familiar with the realities of employment, and who the employer may help select, than to trust their fate to the perceived whims of juries.

Employers are justifiably concerned about jury awards of punitive damages. In California, for example, “only 16 percent of wrongful discharge plaintiffs recovered damages for pain and suffering but . . . more than half of the victorious plaintiffs received punitive damages and . . . the average award was $716,000.”\(^{171}\) Arbitrators, however, probably would not mete out punitive damages awards as large as those awarded by juries. As noted by Dobbs, one reason for awarding punitive damages is to provide for the cost of an attorney.\(^{172}\) Employees’ attorney fees in arbitration would not be as high as in litigation and consequently there would be no need for an award to cover those costs.\(^{173}\)

\(\text{(3) How It Works: Awarding Punitive Damages in Arbitration}\)

Extra-contractual remedies in arbitration can be made available to unionized employees in two ways. First, the parties to a collective bargaining agreement could agree to equalize the remedies in the agreement itself. Second, as a matter of policy, arbitrators could have the power to award punitive damages.\(^{174}\) When a unionized employee is discharged,
that employee would have the option of having all common-law claims relating to the discharge heard by the arbitrator who would in turn have the authority to award extra-contractual damages. If the employee and employer agreed to submit all claims to the arbitrator, the employee would waive any right to pursue a separate wrongful termination claim.

a. The Collective Bargaining Agreement Provides for Extra-Contractual Remedies

In exchange for an agreement empowering the arbitrator to award punitive damages for an unjust discharge in violation of state public policy, the union would have to waive the employee's right to bring a state law cause of action for wrongful discharge or any other similar claim. There is, however, some authority indicating that such an agreement is unenforceable. Moreover, even if such an agreement could be enforced, waiver would require at least "clear and unmistakable" evidence of the parties' intention.

If a union may waive its members' rights to bring state law claims, the availability of extra-contractual remedies in the collective bargaining agreement could lead a court to find an effective waiver. In return for waiving the right to seek relief in court, the employee would gain access to enhanced damages in a quicker and less expensive setting than the judicial system.

Employees may, however, erect a considerable obstacle in the path toward implementing this method of equalizing remedies. They may claim that the union waiver infringes on an individual employee's state

award of punitive damages is not, by itself, grounds for refusing to enforce the award. Finally, we as a society could overcome the tradition of refusing to grant arbitrators the power to award punitive damages. As discussed at infra notes 193-97 and accompanying text, a labor arbitrator's inability to award punitive damages is primarily a matter of tradition.


176. The union's waiver of an employee's right to bring a state law claim may be prohibited by state law. This prohibition, however, may be preempted by federal law.

Whether a union may waive its members' individual, non-preempted state-law rights, is likewise, a question distinct from that of whether a claim is preempted... and is another issue we need not resolve today. We note that under Illinois law, the parties to a collective bargaining agreement may not waive the prohibition against retaliatory discharge nor may they alter a worker's rights under the state worker's compensation scheme. Before deciding whether such a state law bar to waiver could be preempted under federal law by the parties to a collective bar gaining agreement, we would require 'clear and unmistakable' evidence... in order to conclude that such a waiver had been intended.


177. See supra notes 120-21 and accompanying text.
constitutional rights such as the right to a jury trial. In addition, the parties' agreement to equalize remedies requires them to exercise creativity, concession, and agreement in a situation that may not be conducive to any of the aforementioned qualities. Moreover, it implements a piecemeal approach in a situation in which uniformity is preferred and contravenes Congress' intent in enacting the federal labor laws to effectuate a national labor policy.

Because of all the drawbacks of such a scheme, Congress should take matters into its own hands and equalize the remedies by amending the NLRA to provide for compensatory relief and punitive damages. In addition, arbitrators should be allowed to award punitive damages even without specific prior agreement of the parties.

178. An agreement limiting an employee's right to pursue a wrongful termination claim in court may pose two problems. First, the right may be unwaivable. See, e.g., Alexander v. Gardner-Denver, 415 U.S. 36, 51-52 (1974). It also may pose state constitutional problems. By analogy to statutes that limit recovery in medical malpractice actions, such an agreement could infringe on an employee's state constitutional right to redress in the courts. In Detar Hospital, Inc. v. Estrada, 694 S.W.2d 359, 366 (Tex. Ct. App. 1985), for example, the court held that a statute limiting recovery was unconstitutional because it infringed on the plaintiff's right to redress. In Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977), however, the court held that a similar state statute was constitutional. The constitutional provision at issue in Jones stated that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and rights and justice shall be administered without sale, denial, delay or prejudice." Jones, 97 Idaho at 864, 55 P.2d at 404.

Statutes limiting medical malpractice actions also have been challenged as unconstitutionally denying access to the courts. In Kranda v. Houser-Norborg Medical Corp., 419 N.E.2d 1024 (Ind. App. 1981), appeal dismissed, 459 U.S. 802 (1982), a statute that required submission of all malpractice claims to a panel prior to filing in court was held constitutional. The Indiana Constitution provided, in relevant part, that "[j]ustice shall be administered... speedily and without delay." 419 N.E.2d 1036. The court held that the statutory procedure did not violate the state constitution. Id. In Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983), however, the court held a similar statutory requirement to be violative of the state constitution. In so deciding it apparently relied on the prohibition against deprivation of life, liberty, or property, without due process, and the right to petition government for redress.

Finally, statutes attempting to limit medical malpractice actions by requiring submission of all claims to pretrial panels have been challenged as denying a state constitutional right to a jury trial. In Simon v. St. Elizabeth Medical Center, 355 N.E.2d 903 (Ohio Op. 1976), and Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), the statutory schemes were held to violate the state constitutional right to a trial by jury.


180. The allowance should be created judicially, legislatively, and as a matter of overcoming a tradition that no longer serves a useful purpose.

181. See infra notes 182-84 and accompanying text.
b. The Parties Agree to Allow the Arbitrator to Award Punitive Damages After a Discharge

Arbitrators should award punitive damages in appropriate cases.182 The employee who alleges the employer lacked just cause for the discharge is saying that the discharge violated the collective bargaining agreement proviso that employees will be fired only for cause. Labor arbitrations are, in essence, breach of contract actions. Although black letter contract law generally provides that punitive damages are not recoverable for breach of contract, the exceptions that exist should be used to equalize arbitration awards with the recovery available in wrongful discharge actions.183 If the breach of contract also involves the tort of wrongful discharge, the arbitrator should award extra-contractual damages, including recovery for pain and suffering and punitive damages.184

182. This Article only points out the desirability of allowing arbitrators to award punitive damages in order to equalize the remedies available in arbitration with those recoverable in wrongful termination actions. It is not intended to function as an exact working model for how this process should work. One of the problems in providing a model for how arbitrators would go about awarding punitive damages is the fact that there is no one concrete reason why arbitrators generally do not award punitive damages now. One explanation is the notion that labor laws, like the NLRA, are meant to be remedial, not punitive. Following this philosophy, labor arbitrators may be reluctant to award punitive damages. There is a dispute whether arbitrators or courts have the power to award punitive damages under Section 301. See infra notes 192-200 and accompanying text. Accordingly, saying that arbitrators should award punitive damages may require legislation as well as changes in traditional theory about labor law and the role of arbitration.

183. RESTATEMENT (SECOND) OF CONTRACTS § 355 provides: “Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”

In some instances the breach of contract is also a tort, as may be the case for a breach of duty by a public utility. Under modern rules of procedure, the complaint may not show whether the plaintiff intends his case to be regarded as one in contract or one in tort. The rule stated in this section does not preclude an award of punitive damages in such a case if such an award would be proper under the law of torts. See RESTATEMENT (SECOND) OF TORTS § 908 (1965). The term “tort” in the rule stated in this section is elastic, and the effect of the general expansion of tort liability to protect additional interests is to make punitive damages somewhat more widely available for breach of contract as well. Some courts have gone rather far in this direction. See GHIARDI & KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 5.31 n.12 (1981).

Extra-contractual damages should be available under the same terms as they are under common-law wrongful termination claims.

The availability of extra-contractual damages in arbitration would encourage the wrongfully discharged union employee to arbitrate her wrongful termination claim along with her breach of contract action. An employee would agree to have the arbitrator resolve both issues with the knowledge that the arbitrator has the authority to award more than back pay. In essence, the employee would be exchanging the right to bring a common-law tort action for the possibility of enhanced damages in arbitration. The availability of higher punitive damages in court will not lure wrongfully discharged employees away from arbitration. The difference in punitive awards will be one of degree only as opposed to the existing system in which punitive damages basically are unavailable in arbitration. The employee would be willing to give up the right to sue in court because the incentive for bypassing the collective bargaining agreement would be eliminated.

Employees would gain the benefits of the speedy and economical forum provided by arbitration without giving up the possibility of an enhanced damage award. By allowing arbitrators to hear the common-law claim and to award punitive damages, the arbitration process possibly might become slower and more expensive. There is no reason to believe, however, that arbitration would become as costly or cumbersome as a wrongful discharge action in court. Wrongful termination litigation is expensive and this expense may prevent an employee from bringing suit. As one commentator has noted, "[w]rongful termination litigation is fact intensive and requires extensive pretrial discovery. . . . Unless the employee's damages are significant, cost considerations may preclude bringing meritorious cases."185


185. Note, supra note 156, at 161. If an employee does not waive the right, there are two options: 1) the case goes to arbitration but there is no possibility of an enhanced award; or 2) the case goes to arbitration with the possibility of an enhanced award. If the employee is given extra-contractual damages without waiving the right to pursue a common-law remedy, she would have less incentive to pursue judicial remedies; even if she did file in court, double recovery could be barred. If the employee is not awarded extra-contractual damages in arbitration, the employee could try to pursue the action in court. As this is the result precluded by Lingle, the employer's position is not worsened by the arbitrator's ability to award extra-contractual damages.
Because of the advantages to this system, employers are likely to agree to arbitration of the wrongful discharge aspect of the claim.\textsuperscript{186} Attorneys for management have been advising their non-unionized clients to consider some form of alternative dispute resolution to avoid the high cost of litigating wrongful discharge claims.\textsuperscript{187} Employers' attorney fees can amount to $40,000 at the summary judgment stage.\textsuperscript{188} As noted by those who advocate statutory arbitration for the wrongful discharge claims of at-will employees:

>[A]rbitrators have evolved accepted standards for what constitutes just cause for discipline, developed fair and efficient procedures for determining the guilt or innocence of accused employees, exercised responsibility for reviewing the appropriateness of penalties, and provided effective remedies of reinstatement and back pay. For arbitrators, protection against unjust discipline has long ceased being "uncharted territory."\textsuperscript{189}

Arbitrators commonly modify the sanction unless the collective bargaining agreement expressly provides to the contrary.\textsuperscript{190} One commentator remarked that "substance abuse, stress on the job, treatment of handicapped employees, and sexual and racial harassment on the job are all issues that may require an arbitrator to fashion a remedy. Legal precedent has established that arbitrators are allowed great latitude in awarding remedies."\textsuperscript{191} Moreover, arbitrators are more experienced than judges in the "law of the shop" and other aspects of the employment relationship.\textsuperscript{192} There is, therefore, no reason to believe that arbitrators would be unable to fashion punitive damage awards in appropriate cases.

c. Arbitrators Have the Power to Award Punitive Damages

While there is some authority for the proposition that arbitrators lack the power to award exemplary damages, there is also authority to

\begin{itemize}
  \item \textsuperscript{189} Summers, \textit{supra} note 26, at 499.
  \item \textsuperscript{190} \textit{Id.} at 531 (comparing powers of arbitrators under his proposed scheme with those of arbitrators working under union collective bargaining agreements today).
  \item \textsuperscript{192} \textit{Cf.} Summers, \textit{supra} note 26, at 521 (citing advantages of proposed arbitration statute).
\end{itemize}
the contrary. Arbitrators' reluctance to award punitive damages seems to be more a matter of tradition than of legality. Although an arbitrator may be reluctant to award punitives damages because doing so might harm the arbitrator's long term relationship with the union or the employer, this goes to the arbitrator's discretion in awarding punitive damages and not to her power to do so.

There is disagreement among the few courts that have considered the question whether punitive damages are recoverable in an arbitration or in court on a section 301 claim for breach of contract. Those courts


195. The reluctance of arbitrators to award punitive damages and possibly endanger good working relationships with the union and the employers would dissipate as the awards of extra-contractual damages become more common and as employers realized that either the arbitrator would award them or the jury would.

196. These cases should be distinguished from those addressing the question whether punitive damages are recoverable from a union in a breach of the duty of fair representation claim that combined with a section 301 claim for breach of contract against the employer. In International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979), the Supreme Court held that punitive damages are not recoverable against a union in a claim for breach of the duty of fair representation under the Railway Labor Act. The parameters of Foust are still unclear. The Court stated that it had "granted certiorari to resolve this conflict among the Courts of Appeals as to what if any circumstances justify assessing punitive damages against a union that breaches its duty of fair representation." Id. at 46. The Court, however, expressed "no view on the propriety of punitive awards in suits under the Landrum-Griffin Act." Id. at 47 n.9. Some lower courts have held that Foust prohibits punitive damages in section 301 claims under the NLRA. See, e.g., Refino v. Feuer Transp., Inc., 480 F. Supp. 562, 568 n.10 (S.D.N.Y. 1979), aff'd, 633 F.2d 205 (2d Cir. 1980). Even if, however, the Supreme Court extends Foust as a per se rule prohibiting punitive damages awards against unions in fair representation cases under the NLRA, there would be no problem in allowing an employee to recover punitive damages from the employer in a tort claim combined with a breach of contract action and still prohibiting such recovery against the union. The Supreme Court in Faust reasoned that holding unions liable for punitive damages could seriously undermine a union's viability. Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Imposing this risk on employees, whose welfare depends upon the strength of their union, is too great a price for whatever deterrent effect punitive damages may have. Id. at 50-51. This reasoning is inapposite to holding employers liable for punitive damages. Allowing arbitrators to award punitive damages would cause union employees to rely on their collective bargaining agreements rather than circumvent them. This, in turn, would meet the Foust Court's decision to protect unions. Moreover, the punitive damages would be awarded for the wrongful discharge public policy aspect of the claim. If punitive damages were awarded, they would go to the employee or the union, or they could be apportioned between the two.
that have directly addressed the question whether an arbitrator may award punitive damages for a breach of the collective bargaining agreement have come to differing results. Moreover, even those that have reversed an arbitrator's punitive damage award have left open the possibility that, in other circumstances, such an award in fact may be appropriate. The statement of the standard that must be met in order for an arbitrator to award punitive damages also varies from court to court.\footnote{197}

Other cases have addressed the question whether a court may award punitive damages under section 301. Collectively, these cases suggest that under appropriate circumstances, an employer may be liable for punitive damages. In allowing exemplary damages under section 301 in *Sidney Wanzer & Sons, Inc. v. Milk Drivers Union*,\footnote{198} the court reasoned that if such damages would be a "uniquely effective device for changing a specific pattern of illegal conduct by a party before the court, it comes within the remedial purpose of the labor laws, even though the defendant may suffer as if he had been 'punished' " for other reasons.\footnote{199}

\footnote{197}In Howard P. Foley Co. v. International Bhd. of Elec. Workers, Local 639, 789 F.2d 1421 (9th Cir. 1989), for example, the court suggested that an arbitrator could award punitive damages if such a remedy was provided for in the collective bargaining agreement or if there was "substantiating proof of willful or wanton conduct." *Id.* In Refino v. Feuer Transp., Inc., the court noted that in order for a plaintiff to recover punitive damages, he must demonstrate "a willful abuse of a duty imposed as a result of [the employer's] position of authority or trust as well as a breach of contract." 480 F. Supp. 562, 568 (S.D.N.Y. 1979) (quoting Holodnick v. Avco Corp., 514 F.2d 285, 292 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975)). This variation regarding the standard for awarding exemplary damages merely parallels the confusion in the articulated standard for punitive damages in breach of contract cases generally. See United Elec., Radio & Mach. Workers of Am., Local 1139 v. Litton Microwave Cooking Prods., Litton Sys., Inc., 704 F.2d 393, 395 (8th Cir. 1983); Baltimore Regional Joint Bd. v. Webster Clothes, Inc., 596 F.2d 95, 98 (4th Cir. 1979); Westinghouse Elec. v. International Bhd. of Elec. Workers, 561 F.2d 521, 523-24 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036 (1978); Safeway Stores v. Int'l Ass'n of Mach. & Aerospace Workers Automotive Lodge, No. 1486, 534 F. Supp. 638, 640-41 (D. Md. 1982) (suggesting that punitive damages can be awarded if provided for in the collective bargaining agreement or if proof of willful or wanton conduct). But see College Hall Fashions, Inc. v. Philadelphia Joint Bd. Amalgamated Clothing Workers of Am., 408 F. Supp. 722, 727 (E.D. Pa. 1976) (punitive damages may be awarded by arbitration only if expressly provided for in the collective bargaining agreement).

\footnote{198}249 F. Supp. 664 (N.D. Ill. 1966). The court reserved the question whether it would be appropriate on the facts of the case to order punitive damages for its deterrent value. The court held only that punitive damage awards were permissible under section 301.

\footnote{199}*Id.* at 671; see also International Bhd. of Teamsters, Local Union, No. 117 v. Washington Employers, Inc., 557 F.2d 1345 n.5 (9th Cir. 1977) (while reserving judgment on this question, the court noted that other courts were split as to whether punitive damages were allowable under section 301); Pierce v. Fox Mfg. Co., 97 L.R.R.M. (BNA) 2321, 2324 (N.D. Ga. 1977) ("The purpose of punitive damages is to insure that the objectionable conduct is not repeated, and may justify an award of punitive damages against both the unions and defendant Fox [the employer]."); Patrick v. I.D. Packing Co., 308 F. Supp., 821, 823-24 (S.D. Iowa 1969)
An additional explanation for the reluctance of arbitrators to award punitive damages is the notion that our federal labor law was meant to be remedial, not punitive, in nature. This rationale may have supported the mild remedial provisions of the NLRA at the time of its enactment, but no longer is tenable. Although adopting a different approach to labor law reform, Paul Weiler states that "back pay and reinstatement . . . simply are not effective deterrents to employers who are tempted to trample on their employees' rights." Moreover, punitive damages are necessary when the amount of back pay awarded may be so small that punitives are necessary to "punish the employer for past misconduct and to deter future misconduct."

Because many section 301 claims also could have been brought as unfair labor practice proceedings before the NLRB, section 10(c) of the NLRA also must be amended to provide for monetary remedies in addition to back pay. This amendment also is necessary to protect those employees who are engaged in other concerted activities "for the purpose of collective bargaining or other mutual aid or protection." Employees who are, for example, discharged for their union organizing efforts have engaged in conduct that is arguably protected by section seven and, therefore, the NLRB would have primary jurisdiction under Garmon v. San Diego Building Trades Council. Accordingly, under the Garmon preemption doctrine, these employees would be complainants before the NLRB, and not the courts. Lingle, however, leaves open the question of whether a wrongful termination claim (as opposed to a breach of contract action) of a victim of an unfair labor practice would be preempted. Employees who are discharged as the result of unfair labor practices should stand in as good of a position as their co-workers whose discharges constitute breaches of collective bargaining agreements that can be taken to arbitration.

Section 301 should be amended to provide that the federal courts may grant appropriate relief including, but not limited to, compensatory damages, reinstatement, and punitive damages. In addition, Congress should provide that an arbitrator's award may not be overturned by the courts.
federal courts solely on the ground that the arbitrator awarded extra-contractual damages.\(^{205}\)

Congress appears to have some interest in imposing sterner sanctions against those who commit unfair labor practices. In 1977 and 1978, Congress considered labor reform legislation that passed through the House easily, but was narrowly defeated in the Senate.\(^{206}\) The Labor Reform Act would have provided "beefed-up penalties and remedies"\(^{207}\) in addition to rules regarding nonemployee access during organizational campaigns and expediting union elections. The enhanced penalties and remedies portion would have allowed for disbarment of all federal contractors who willfully violated an NLRB order, and would have provided a "make whole" remedy for employees if their employer refused to bargain and a 150 percent back pay provision\(^{208}\) for employees discharged as the result of an unfair labor practice. The enhanced back pay provision was necessary because:

\[\text{[T]he present system of compensating ... is inadequate. The threat of back pay awards simply does not deter discharges ... It does not adequately compensate the employee for the true loss he has incurred. It fails to recognize the gravity of the employer's conduct both with respect to its effect on the employee and the union's organizing drive.}^{209}\]

It is time to change the philosophy regarding our national labor policy that labor laws only were meant to be remedial. In the years since passage of the original Wagner Act, our society, our economics, and our laws have changed. Accordingly, arbitrators should have the power to order compensatory and punitive damages in appropriate cases.

\(^{205}\) This amendment scheme would not alter the current procedure if a union fails to pursue the employee's grievance. The employee still could bring a section 301 claim alleging breach of the collective bargaining agreement by the employer and breach of the duty of fair representation by the union. As a result of this amendment the court could, however, have the authority to order extra-contractual damages at least as against the employer. These employees would then be in the same position vis-a-vis damages as their co-workers who went to arbitration with the union's help. The court's ability to award punitive damages against the union would depend on whether Congress makes an explicit statement regarding Foust's applicability to the NLRA or, if Congress remains silent, the courts will have to decide this question.


\(^{207}\) \textit{Id.} at 9.

\(^{208}\) 200\% in the House version. \textit{Id.} at 17, n.62.

\(^{209}\) *Rosen, supra note 206, at 19 (quoting 123 CONG. REC. S12358 (daily ed. July 19, 1977) (address of Senator Williams)).
Conclusion

Collective bargaining agreements protect employees from unjust discharge. Unionized employees discharged in violation of a collective bargaining agreement may seek reinstatement and back pay. This protection is made possible because of the collective strength of unions. Until recently, at-will employees had no such protection from arbitrary discharge. Judicial erosion of the employment at will doctrine, however, has provided some measure of job security to at-will employees by recognizing a cause of action for wrongful termination. An at-will employee who is discharged in violation of public policy now can recover tort damages.

Because the tort damages available to individuals in a wrongful discharge action are far greater than those available under a collective bargaining agreement, unionized workers are now filing tort actions instead of relying on the grievance and arbitration process. This phenomena may be contributing to the decline in unionization in this country.

Courts have grappled with the question whether unionized employees should be allowed to sue their employers for wrongful discharge in addition to pursuing their collectively bargained for remedies. Most courts addressed the question in terms of whether a wrongful discharge claim by a unionized employee should be preempted by the NLRA. Prior case law mandated a case by case approach, and the courts in turn considered whether each particular wrongful termination claim was preempted. Accordingly, the courts determined whether it was fair or just to preempt a particular individual’s claim of wrongful discharge.

This Article has suggested that the effect of wrongful termination actions on unions needs to be scrutinized. To alleviate the negative effect that the existence of wrongful termination actions may be having on unions, we must reduce the incentive unionized workers have to file tort actions. We also must encourage reliance on the collective bargaining process. In seeking these goals we must be careful, however, to continue to protect at-will workers. To protect at-will individuals and collective bargaining we must equalize the remedies by making punitive damages available in arbitration and under the NLRA. This proposed solution will allow at-will employees to vindicate their individual rights without sacrificing the collective strength of unions.