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RETALIATORY DISCHARGE, WORKERS' COMPENSATION AND SECTION 301 PREEMPTION
LINGLE v. NORGE DIV. OF MAGIC CHEF, INC.

INTRODUCTION

Ever since Congress passed the New Deal[1] and post-New Deal labor acts,[2] state and federal courts have struggled to determine the preemptive effect these federal statutes have or were meant to have on state laws affecting labor.[3] A current issue is the extent to which section 301 of the Labor-

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1. The culminating piece of New Deal labor legislation was the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-173 (1982)). Originally passed as a part of an effort to increase economic activity during the Depression, Congress intended the NLRA to promote peaceful labor relations by guaranteeing employees the right to organize and bargain collectively with their employers. Wagner Act, § 1, 49 Stat. 449 (1935). *See also* J. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 7 (1974) (discussing how severe economic pressure of the Depression spurred the Roosevelt Administration and Congress into action). The NLRA, however, was not the first New Deal labor act to guarantee the right to unionize; it was merely the successor, in permanent form, of section 7(a) of the National Industrial Recovery Act (NIRA), § 7(a), 48 Stat. 198 (1933). S. REP. No. 573, 74th Cong., 1st Sess. (1935); H.R. REP. No. 1174, 74th Cong. 1st Sess. (1935); 79 CONG. REC. 9677 (1935). In Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the Court held that the NIRA was an unconstitutional use of Congress' power under the commerce clause. In NLRB v. Jones Laughlin Steel Corp., 301 U.S. 1 (1937), however, the Court began its historic shift toward deference to the legislative branch in economic matters, and upheld the NLRA as a constitutional exercise of Congress' commerce power. *Id.* at 48-49 (NLRA does not violate employers' or employees' individual constitutional rights). *See generally* L. BAILLET, SURVEY OF LABOR RELATIONS 47-49 (2d ed. 1987) (briefly summarizing ultimate constitutional validity of the NLRA). *But cf.* Comment, *The NLRA—Constitutional and Statutory Problems,* 30 ILL. L. REV. 884 (1936) (timely article predicting unconstitutionality of the NLRA). For a history of pre-New Deal labor legislation and a short history of the labor movement up to the New Deal, see A. MASON, ORGANIZED LABOR AND THE LAW (1925).

2. The federal government's control of labor relations to the exclusion of the states has steadily increased since the New Deal. *See generally* Smith, *Preempting State Regulation of Employment Relations: A Model for Analysis,* 20 U.S.F. L. REV. 35 (1985) (describing entry of the Federal Government into employee civil rights and retirement benefits as examples). The post-New Deal labor act pertinent to this Note is the Labor-Management Relations Act (LMRA), also known as the Taft-Hartley Act, 61 Stat. 136 (1947) (codified as amended 29 U.S.C. §§ 141-87 (1982)). The LMRA reinforces employees' rights and clarifies employers' rights in a continued effort to encourage peaceful and productive labor relations in industries affecting interstate commerce. Taft-Hartley Act, § 1, 61 Stat. 136 (1947). The LMRA actually amended and incorporated the NLRA, but, for purposes of clarity, this Note will refer to all sections which were originally part of the Wagner Act of 1935 as the NLRA and those sections which were added by the Taft-Hartley Act of 1947 as the LMRA.

3. The federal labor statutes have effectively eliminated analogous state labor relations provisions in those interstate industries where the NLRB has chosen to claim jurisdiction. *See, e.g.,* Amalgamated Utility Wkrs. (C.I.O.) v. Consolidated Edison Co., 309 U.S. 261 (1940)

Management Relations Act ("LMRA")[4] preempts state tort actions brought

(where NLRB is granted sole jurisdiction of an aspect of labor relations, it must be exclusive forum to resolve matter). Given the broad and comprehensive definition of interstate commerce, the NLRB has potential power over practically all employers and employees. *See* Santa Cruz Co. v. NLRB, 303 U.S. 453 (1938) (local activity can be within federal control if activity has any impact on interstate commerce). States, however, continue to have labor relations statutes and boards that are active in areas that federal law does not regulate, such as public employees and farming. *See, e.g.,* Illinois Public Labor Relations Act, ILL. REV. STAT. ch. 48, ¶ 1601-1627 (1985). States are also free to regulate those employers that do not meet the NLRB's jurisdictional requirements. 29 U.S.C. § 164(c)(2) (1982). *See generally* C. KILLINGSWORTH, STATE LABOR RELATIONS ACTS (1948) (discussing which areas of labor relations are left to the States after passage of the LMRA).

Early preemption doctrine under the NLRA also eliminated state regulation that would cause actual conflict with the NLRB's enforcement of federal labor regulation even though the activity was not expressly within the NLRB's sole jurisdiction. *See, e.g.,* Garner v. Teamsters, Local 776, 346 U.S. 485 (1953) (state court precluded from issuing strike injunction because the NLRB was vested with power to hear grievance and allowing state courts to hear the matter would conflict with federal interest in uniform application). *But cf.* Rose, *The Labor Management Relations Act and the State's Power to Grant Relief,* 39 VA. L. REV. 765 (1953) (arguing that private rights should be enforceable in state courts if matter is not expressly placed within the NLRB's sole jurisdiction). The Supreme Court, however, expressly rejected the public versus private right distinction in *Garner,* 346 U.S. at 500. Courts have also held that state laws which curtail the employee rights to organize guaranteed by § 7 of the NLRA, 29 U.S.C. § 157 (1982), conflict with federal law. *See, e.g.,* Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945) (striking down statute providing for state licensing of union business agents as violative of employees' § 7 right to choose bargaining representatives).

More extensive preemption of state regulations affecting labor began with the Supreme Court's decision in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). In *Garmon,* the court held that the NLRA must preempt state regulation of activities that are merely arguably protected or prohibited by sections 7 or 8 of the Act in order to protect the NLRB's primary jurisdiction. *Id.* at 246. The Court relied on the federal interest in uniform labor precedent as demonstrating Congress' intention to leave such matters within the exclusive competence of the NLRB. *Id. See also* Michelman, *State Power to Govern Concerted Activities,* 74 HARV. L. REV. 641 (1961) (critique of Court's rationale for the *Garmon* rule). The expanding preemption of state law continued to develop with new doctrines which focused on conflicts between state controls and the administrative scheme or purpose of the federal acts. *See, e.g.,* Beasly v. Food Fair, Inc., 416 U.S. 653 (1974) (NLRA § 14(a), providing that supervisors are not entitled to same union classification as employees, preempts state law protecting supervisors' right to join in union activity because the federal statute indicates a federal policy that supervisors must not serve both their employer and a labor union); Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964) (lack of congressional regulation can preempt state regulation if state regulation would upset balance of power between labor and management as foreseen by the LMRA); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (federal policy of encouraging arbitration requires state courts to abide binding grievance decisions on the merits). *Cf.* Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320 (1972) (grievance arbitration system of the Railway Labor Act, 45 U.S.C. §§ 151-163 (1982), must be exclusive, in part, because of its great administrative complexity).

In the interest of federalism, the Supreme Court has regularly created exceptions to the increasingly hostile federal preemption doctrines. As noted in Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971): "We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much is left to the states." Early Supreme Court cases revealed a

by employees against their employers.[5] In *Allis-Chalmers Corp. v. Lueck,*[6] the Supreme Court held that section 301 will preempt a state law claim if

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deference to state regulation of activity that was traditionally part of the states' police power and which did not actually conflict with federal law. *See, e.g.,* United Construction Workers v. Laburnum, 347 U.S. 656 (1954) (LMRA did not preclude state court from hearing common law tort claim even though based on an unfair labor practice).

Garmon, however, has limited exceptions to NLRA primary jurisdiction to areas of compelling state interest or of only peripheral concern to the policies of the NLRA. *Garmon,* 359 U.S. at 247-48. *See generally* Hardy, *The Preemption of State Remedies by the NLRA,* 6 WAKE FOREST L. REV. 431 (1970) (discussion of the *Garmon* rule and its exceptions). *See also infra* note 41 (discussing exceptions under *Garmon*). *But see* Recent Decisions, *Federal Pre-Emption—State Power to Exclude Ex-Felons from Union Office,* 59 MICH. L. REV. 643 (1961) (criticizing what author viewed as too broad an exception to the *Garmon* rule). Moreover, an exception to preemption will result if the court finds evidence of a specific congressional intent to leave a matter to state control. *See, e.g.,* Malone v. White Motor Co., 435 U.S. 497, 512-514 (1978) (Minnesota pension fund upheld in spite of possible preemption under the balance-of-power test where Court found specific congressional intent that states could provide additional pension provisions for employees). *See also* New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 540-546 (1979) (state law altering balance of power between labor and management not preempted because legislative histories of the NLRA and the Social Security Act demonstrate Congress' desire that states be given freedom to regulate).

4. 29 U.S.C. § 185(a) (1982): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." Congress passed the statute primarily to guarantee that labor unions as well as employers would be assessed damages for breaching collective bargaining agreements and to guarantee a forum for such claims. *See* 92 CONG. REC. 662, 668, 677, 679, 684, 686, 753, 767 (1946); *see also* Textile Workers v. Lincoln Mills, 353 U.S. 448, 462-495 (1957) (Frankfurter, J., dissenting) (summarizing the legislative history of § 301).

5. There are a variety of types of tort claims that a union employee may bring against an employer. However, the employer commonly raises, with varying degrees of success, the defense of preemption under § 301 or the NLRA. *See, e.g.,* International Bhd. of Elec. Workers v. Hechler, 107 S. Ct. 2161 (1987) (breach of duty to provide safe workplace); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (tortious bad faith breach of contract); Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290 (1977) (intentional infliction of mental distress); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966) (defamation); Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987) (breach of implied covenant of good faith and fair dealing); Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987) (retaliatory discharge for reporting employer's violations of state law); Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536 (9th Cir.) (negligent infliction of mental distress and malicious libel), *cert. denied,* 108 S. Ct. 251 (1987); Keehr v. Consolidated Freightways of Del., Inc., 825 F.2d 133 (7th Cir. 1987) (tortious invasion of privacy); Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir.), (retaliatory discharge for exercising a state right) *cert. granted,* 108 S. Ct. 226 (1987); Gibson v. AT & T Technologies, 782 F.2d 686 (7th Cir.) (fraud perpetrated by collective bargaining agreement), *cert. denied,* 106 S. Ct. 3275 (1986); Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984) (retaliatory discharge for reporting violations of federal law); Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984) (wrongful discharge); Muenchow v. Parker Pen Co., 615 F. Supp. 1405 (W.D. Wis. 1985) (misrepresentation); Bartley v. University Asphalt Co., 111 Ill. 2d 318, 489 N.E.2d 1367 (1986) (civil conspiracy). Whether or not a tort is preempted appears to depend upon the reviewing court rather than the particular tort at issue. *See infra* note 10.

6. 471 U.S. 202 (1985).

resolution of the claim is substantially dependent upon the terms of a collective bargaining agreement.[7] The Court stated that the test adopted in *Lueck* was narrow in scope[8] and should be applied by lower courts on a case-by-case basis.[9]

Lower federal and state courts, applying *Lueck's* purposely narrow test, however, have reached results that are neither uniform,[10] nor, in many cases, well reasoned.[11] The disagreement among these courts centers primarily on the scope of the *Lueck* test's preemptive power.[12] In response to the in-

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7. In *Lueck,* the court stated: "[W]hen the resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made 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." *Id.* at 220 (citations omitted).

8. *Id. See generally* Kinyon and Rohlik, *"Deflouring" Lucas Through Labored Characterizations: Tort Actions of Unionized Employees,* 30 ST. LOUIS U.L.J. 1 (1985) (discussing possible effects and interpretations of the *Lueck* test).

9. *Lueck,* 471 U.S. at 220.

10. Preemption of the common law tort of defamation provides a good example of the great disparity of results and rationales under the *Lueck* test. In Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536, 538 (9th Cir. 1987), the Ninth Circuit Court of Appeals held that an employee's defamation claim was not preempted by section 301 because the labor contract between the parties did not specifically address the making of defamatory remarks. In Krasinski v. United Parcel Service, 155 Ill. App. 3d 831, 836, 508 N.E.2d 1105, 1110-11 (1987), an Illinois state appellate court also held that an employee's defamation claim was not preempted by section 301 but, unlike the *Tellez* court, relied on the fact that the tort was firmly rooted in state public policy. In Green v. Hughes Aircraft Co, 630 F. Supp. 423, 426-27 (S.D. Cal. 1985), however, a Ninth Circuit federal district court preempted a defamation claim because the defamatory statements were central to rights and grievance procedures provided under the collective bargaining agreement.

11. Two federal courts of appeals cases provide extreme examples of the lack of analysis that can occur in the application of *Lueck's* "substantially dependent" test. In Johnson v. Hussman, 805 F.2d 795, 797 (8th Cir. 1986) (quoting *Lueck,* 471 U.S. at 220), the court reasoned that, "appellant's state tort claim for retaliatory discharge for filing a worker's compensation claim has been preempted by federal labor law because resolution of that claim is 'substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract.'" The *Johnson* court simply stated its conclusion without offering any reason as to why resolution of the employee-plaintiff's tort action would require analysis of the labor contract. *Id.* A lack of analysis, however, is not limited to cases which preempt a tort claim. In Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3rd Cir. 1986), the court stated that a retaliatory discharge for exercising a workers' compensation rights claim would not be preempted by section 301 because the "workers' compensation rights are rooted in state law." As in *Johnson,* the *Herring* court did not precisely explain how it avoided preempting the tort under the *Lueck* test.

12. *See, e.g.,* Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 997 (9th Cir. 1987) (would preempt state tort claims that are solely based on employment relationship); Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987) (would preempt state tort action if conduct that comprises the state action is already addressed in the labor contract); Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2d Cir. 1987) (would preempt state tort action if it could not be resolved without referring to labor contract); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3rd Cir. 1986) (would not preempt claim "rooted in state law"); Lingle v. Norge Div. of Magic Chef, Inc., 618 F. Supp. 1448, 1449 (S.D. Ill. 1985) (would preempt state tort actions whenever they "would undermine the mutually agreed upon

creasing confusion below, the Supreme Court recently reviewed two federal courts of appeals' applications of the *Lueck* test.[13] The Court did not, however, address or attempt to correct the general confusion over *Lueck's* preemptive effect.[14]

Against this background of confusion and disagreement over *Lueck*, the Seventh Circuit Court of Appeals, sitting en banc, decided *Lingle v. Norge Division of Magic Chef, Inc.*[15] In *Lingle*, the court held that section 301 preempted Illinois' common law tort which prohibits the retaliatory discharge of employees who file claims under the Illinois Workers' Compensation Act.[16] The *Lingle* court's decision directly conflicts with all but one of the federal circuits that have decided the issue, as well as an Illinois Supreme Court decision.[17]

Lingle significantly curtailed union-represented employees' rights in Illinois.[18] In fact, *Lingle* could actually penalize union employees in Illinois because the common law workers' compensation discharge claim, with its

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procedures provided for in that agreement"), *aff'd*, 823 F.2d 1031 (7th Cir. 1987); Krasinski v. United Parcel Serv., Inc., 155 Ill. App. 3d 831, 838, 508 N.E.2d 1105, 1110 (1987) (would only preempt state tort actions derived from labor contracts).

13. International Bhd. of Elec. Workers v. Hechler, 107 S. Ct. 2161 (1987) (§ 301 preempted union's duty to provide safe workplace because duty was only a contractual obligation), *rev'g* 772 F.2d 788 (11th Cir. 1985); Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987) (9th Cir. 1986) (breach of individual employment contract claim was not completely preempted by federal labor law and, therefore, not removable to federal court under the complete preemption doctrine), *aff'g* 786 F.2d 928 (9th Cir. 1986).

14. Although *Caterpillar* did address the interplay between the *Lueck* test and federal question removal jurisdiction, both *Hechler* and *Caterpillar* were case specific applications of *Lueck*. In neither opinion did the Court address the general disparity of section 301 preemption results or rationales in the lower courts. *See Hechler*, 107 S. Ct. at 2166; *Caterpillar*, 107 S. Ct. at 2428.

15. 823 F.2d 1031 (7th Cir.), *cert. granted*, 108 S. Ct. 226 (1987). A panel of the court did not ever render a decision in the case. *Id.* at 1031.

16. *Lingle*, 823 F.2d at 1047. *See also* ILL. REV. STAT. ch. 48, ¶¶ 138.1-138.30 (1985) (Illinois Workers' Compensation Act).

17. Of the three other circuits that have decided the issue only the Eighth Circuit supports *Lingle's* conclusion. *See* Johnson v. Hussmann Corp., 805 F.2d 795, 797 (8th Cir. 1986). The Second and Third Circuits have concluded that section 301 does not preempt workers' compensation discharge claims. *See* Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2d Cir. 1987); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3rd Cir. 1986). The *Lingle* court found support for its preemption of the state tort claim in a line of somewhat inconsistent Ninth Circuit decisions. *Lingle*, 823 F.2d at 1049. The Ninth Circuit, however, subsequently aligned itself with the Second and Third Circuits by holding that section 301 does not preempt the tort of wrongful discharge if it furthers an important state public policy. Paige v. Henry J. Kaiser Co., 826 F.2d 857, 863 (9th Cir. 1987). Although not a workers' compensation discharge case, *Paige* adopted the public policy approach which the *Lingle* court assumed the Ninth Circuit had rejected. *Lingle*, 823 F.2d at 1049. *See also* Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986) (holding that § 301 does not preempt Illinois workers' compensation discharge claim under *Lueck*), *cert. denied*, 107 S. Ct. 3248 (1987). *See infra* notes 176-77 and accompanying text.

18. *See infra* notes 181-91 and accompanying text.

potentially more potent remedies, remains available to non-union employees.[19] *Lingle* may also strain the administration of justice within Illinois because it conflicts with the Illinois Supreme Court's previous resolution of this issue.[20] These potential and actual defects warrant comprehensive action by the United States Supreme Court to resolve both the conflict within Illinois and the more general disagreement among lower courts over the application of the *Lueck* test.[21]

This Note will first describe the history and background of the preemption of workers' compensation discharge claims by federal labor law. It will also explain how the *Lingle* majority came to the wrong conclusion by significantly altering the *Lueck* test, and how this decision will affect Illinois employees and future section 301 preemption analysis. Finally, this Note will suggest a refinement of the *Lueck* preemption test and conclude that this refinement of *Lueck* would lead to more certain as well as fairer results.

I. BACKGROUND

The Supreme Court has articulated several preemption principles in the context of the federal labor laws.[22] The preemption doctrines relevant to

19. The Illinois Supreme Court has stated that "[i]t 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." Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d. 143, 150, 473 N.E.2d 1280, 1284 (1984). *See also* Note, *Midgett v. Sackett-Chicago, Inc.*, 16 LOY. U. CHI. L.J. 799, 819 (1985) (union employees' remedy is incomplete unless punitive damages are available where state public policy has been violated by discharge).

More generally, the United States Supreme Court has stated: "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non-union employees." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985). In *Metropolitan,* the Court held that a state statute that mandated minimum health care benefits in insurance policies was not preempted under the balance-of-power preemption doctrine. *Id. See infra* notes 43-47 (discussing the balance-of-power test).

20. Judge Ripple, in dissent from the *Lingle* majority, stated that "an intermediate federal appellate court, relying upon no explicit congressional mandate and no direct Supreme Court precedent" has effectively frustrated an important state public policy recognized by the Illinois Supreme Court. *Lingle,* 823 F.2d at 1055 (Ripple, J., dissenting).

21. Prior to *Lingle,* Justice White wrote in dissent from the Supreme Court's denial of certiorari in Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986): "I would grant the petition and resolve the conflict, rather than wait until the conflict invites more litigation and becomes more acute." Prestress Eng'g Corp. v. Gonzalez, 107 S. Ct. 3248 (1987). On October 13, 1987, the Supreme Court agreed with Justice White and granted Jonna Lingle's petition for certiorari. Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 226 (1987).

22. Under the NLRA, a state regulation can be preempted in three different ways: (1) where a state law curtails employee rights clearly protected by section 7, *see, e.g.,* Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945) (state law which interferes with federally protected § 7 rights creates an actual conflict and is preempted by direct operation of the supremacy clause); (2) under the *Garmon* rule's extensive protection of the NLRB's primary jurisdiction, *see, e.g.,* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (activity that is clearly or

this Note involve two of Congress' most important pieces of labor legislation: the National Labor Relations Act ("NLRA"),[23] and the Labor-Management Relations Act ("LMRA").[24] The Supreme Court's labor preemption doctrines derive from one of two broad grounds of state law conflict with federal law: (1) state law conflict with the substantive rights and policies of the federal law, or (2) state law conflict with the primary jurisdiction of the federal enforcement agency, the National Labor Relations Board ("NLRB").[25]

A. Preemption Under the NLRA

1. The NLRA preemption doctrines

Congress enacted the NLRA primarily to guarantee employees the right to collectively bargain with their employers.[26] Section 7 of the

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arguably governed by §§ 7 or 8 of the NLRA can usually only be addressed by the NLRB); or (3) under the balance of labor v. management power test, *see, e.g.,* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 149 (1976) (state regulation that alters the balance of power between labor and management as established by federal labor law must be preempted).

Under the LMRA additions to the NLRA, preemption can occur either (1) under the balance-of-power test, Local 20, Teamsters Union v. Morton, 377 U.S. 252, 260 (1964), or (2) under the substantially-dependent test, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

Under the Railway Labor Act (RLA), preemption occurs whenever a state claim implicates contractual grievance procedures. Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 323 (1972). The more rigid and comprehensive preemptive effect of the RLA on state law can be explained by the administrative complexity of the act, Koehler v. Illinois Gulf Central R.R. Co., 109 Ill. 2d 473, 488 N.E.2d 542 (1986), and by the common law's historical acceptance of strict regulation of common carriers, *see* Doser v. Interstate Power Co., 173 N.W.2d 556 (Iowa 1970) (discussing history of common carriers' greater duty of care under common law). Exceptions to RLA preemption have, nevertheless, resulted where important state policies have been at issue. *See, e.g.,* Stepanischen v. Merchants Dispatch Transp. Corp., 722 F.2d 922, 932 (1st Cir. 1983) (discharge by employer motivated by anti-union animus violates state policy and, therefore, permits suit under state law); Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984) (RLA does not preempt workers' compensation discharge claim protecting important state right), *appeal dismissed sub nom.* Pan Am. World Airways, Inc. v. Puchert, 472 U.S. 1001 (1985).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982) can preempt state-law claims under a primary jurisdiction test similar to the *Garmon* rule. *See* Wolk v. Saks Fifth Ave., Inc., 728 F.2d 221 (3rd Cir. 1984). The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982), expressly indicates the scope of preemption Congress meant it to have and, along with the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 411 (1982), it is a rarity among the federal statutes affecting labor relations. The LMRDA, however, states that its provisions have no preemptive effect on protections provided by state law. *Id.* For a complete discussion of the preemptive effect of all the federal labor statutes and the various preemptive doctrines, see Smith, *supra* note 2.

23. Also known as the Wagner Act of 1935 §§ 1-16, 29 U.S.C. §§ 151-166 (1982).

24. Also known as the Taft-Hartley Act of 1947 §§ 101-503, 29 U.S.C. §§ 141-44, 151-67, 171-87 (1982).

25. A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 895-96 (10th ed. 1986).

26. Wagner Act, July 5, 1935, ch. 372 § 1, 49 Stat. 449, as amended 29 U.S.C. § 151

NLRA[27] guarantees employees the right to organize and bargain through representatives of their own choosing and, as amended, the right to refrain from such union activity.[28] Section 8 of the NLRA[29] prohibits both employers and labor unions from engaging in certain enumerated unfair labor practices.[30] Preemption of state laws by the NLRA occurs in three situations: (1) where the state curtails conduct that is protected by section 7 of the NLRA;[31] (2) where the state regulates conduct clearly or arguably already protected or prohibited by sections 7 or 8 of the NLRA;[32] and, (3) where the conduct regulated by the state is not addressed by the NLRA, but is conduct that Congress intended to leave unregulated.[33] The first

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(1982). In 1947, Congress amended section 1 of the Wagner Act to include employees' right not to join labor unions as well as the right to engage in union activity. Taft-Hartley Act, June 23, 1947, ch. 120 Tit. I § 101, 61 Stat. 136 (1947). *See also* C. KILLINGSWORTH, *supra* note 3, at 11-16 (1948) (discussing aspects of the LMRA that began to regulate unions more closely and their influence on state law).

27. 29 U.S.C. § 157 (1982).

28. Section 7 provides:

> 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 such activities . . . .

Id. See L. BAILLET, *supra* note 1; P. SMITH, REDEEMING THE TIME, 446-60 (1987) (background of original legislative right to unionize and its political and social implications).

29. 29 U.S.C. § 158 (1982).

30. *Id.* Section (a) of the act sets forth unfair labor practices as applied to management. *Id.* § 158(a). Section (b) sets out unfair labor practices as applied to unions. *Id.* § 158(b).

31. *See* Hill v. Florida *ex rel.* Watson, 325 U.S. 528 (1945). *See also infra* notes 34-36 and accompanying text.

32. Where the activity is expressly within the NLRB's sole subject matter jurisdiction, the Supreme Court has held that they must be preempted because actual conflict would result from either state or federal courts hearing such claims at the trial level. Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co., 309 U.S. 261 (1940). *See also* Garner v. Teamsters, Local 776, 346 U.S. 485 (1953) (precluding state court from issuing strike injunction because the NLRB had power to hear matter and uniformity of such precedent had to prevail); *supra* notes 3, 26.

In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), the Court extended the primary jurisdiction NLRA preemption doctrine to arguably protected or prohibited conduct, and further developed the doctrine in Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 197 (1978) (distinguishing between arguably protected and arguably prohibited conduct for purposes of analysis and holding that arguably prohibited conduct is entitled to less protection). *See infra* notes 37-41 and accompanying text.

33. The balance-of-power test was established in Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964), as a preemption doctrine under LMRA section 303. The balance-of-power test is derived from language in section 1 of the NLRA stating that "it is the policy of the act to establish an equality of bargaining power between employer and employees." 29 U.S.C. § 151 (1982). In Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976) the Court revived and extended the balance-of-power test under the NLRA and stated that Congress intended certain forms of economic pressure to remain unregulated because they were left "to be controlled by the free play of economic forces." *See infra* notes 43-46 and accompanying text.

type of preemption is exemplified by *Brown v. Hotel and Restaurant Employees and Bartenders,*[34] where the Supreme Court reminded lower courts that, if a state law interferes with conduct that is expressly protected by federal law, preemption follows as a matter of substantive right.[35] The state's interest in the regulation is irrelevant to this first type of preemption under the NLRA.[36]

San Diego Bldg. Trades Council v. Garmon[37] clarified and extended a second, and broader, type of NLRA preemption that protects the NLRB's primary jurisdiction.[38] The *Garmon* rule mandates deference by the state to the NLRB when an activity is clearly or arguably regulated by section 7 or section 8 of the NLRA.[39] The *Garmon* analysis, however, differs from the first, substantive type of NLRA preemption in that the state's interest in local control will be weighed against the federal interest in a uniform labor system.[40] An exception to *Garmon* preemption results if the state regulation

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34. 468 U.S. 491 (1984).

35. *Id.* at 501. *See also* Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239-40 (1967) (invalidating state unemployment compensation law because it infringed on conduct expressly protected by § 7); Bus Employees v. Missouri, 374 U.S. 74, 81-82 (1963) (striking down statute prohibiting peaceful strikes against utilities); Automobile Workers v. O'Brien, 339 U.S. 454, 458-59 (1950) (invalidating state "strike-vote" regulations).

36. Balancing is inappropriate because the supremacy clause of the United States Constitution, Art. VI, § 1, mandates preemption of state laws that actually conflict with federal legislation. *Brown*, 468 U.S. at 500. *See* Free v. Bland, 369 U.S. 663, 666 (1962).

37. 359 U.S. 236 (1959).

38. In *Garmon*, the Supreme Court established the *Garmon* rule, and thereby expanded the NLRA's primary jurisdiction preemption doctrine. The Court stated: "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this court to decide whether such activities are subject to state jurisdiction." *Garmon*, 359 U.S. at 246. The Court continued: "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id. See generally* Michelman, *supra* note 3 (early interpretation and criticism of the *Garmon* rule and its broadened preemptive effect). For a more current analysis approving of the *Garmon* rule and discouraging any limitation of its preemptive effect, see Come, *Federal Application of Labor-Management Relations: Current Problems in the Application of* Garmon, 56 VA. L. REV. 1435 (1970).

39. *Garmon*, 359 U.S. at 246. The deference shown to the NLRB by the *Garmon* Court grew out of the Board's unique role as the prime arbiter of labor disputes under the NLRA. The Supreme Court's NLRA preemption doctrines, and in particular the *Garmon* rule, preserve the NLRB's effectiveness by preventing encroachments on its jurisdiction. For a good background on the NLRB, its importance to Congress' control of federal labor law and this topic generally, see J. GROSS, *supra* note 1.

40. *Garmon*, 359 U.S. at 243-44. Because balancing is only appropriate in primary jurisdiction preemption it is important to distinguish this doctrine, based on agency expertise, from preemption that results when a state law curtails a section 7 right. Brown v. Hotel and Restaurant Employees and Bartenders, 468 U.S. 491, 502-504 (1984). Of this important distinction, however, the Supreme Court has stated that "in referring to decisions holding state laws preempted by the NLRA, care must be taken to distinguish preemption based on the federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . , although the two are often not easily separable." Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 n.19 (1969).

is deeply rooted in local law or if the regulation is of only peripheral concern to federal labor policy.[41]

The third preemption doctrine, which is not limited to the NLRA, allows a court to preempt a state regulation of conduct which has not been addressed by federal law if Congress' silence on the matter reflects an intention that the activity remain unregulated.[42] In *Local 20, Teamsters Union v. Morton,*[43] the Supreme Court stated that the key to determining Congress' intent was through a balance-of-power inquiry.[44] If the state regulation threatened to upset the balance-of-power between labor and management as expressed in national labor policy, preemption would be appropriate.[45] The balance-of-

41. The Supreme Court has used a balancing test to carve exceptions out of the *Garmon* rule for state regulations that were deeply rooted in local law or of only peripheral concern to federal labor policies. *See, e.g.,* Farmer v. United Bhd. of Carpenters & Joiners of Am. Local 25, 430 U.S. 290, 305 (1977) (intentional infliction of mental distress claim excepted from the *Garmon* rule if conduct is truly outrageous); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 54 (1966) (defamation claim by employer against union excepted from the *Garmon* rule); De Veau v. Braisted, 363 U.S. 144 (1960) (state power to exclude felons from union office not preempted by *Garmon*). A number of lower court cases, however, have distinguished "personal torts" from "business torts," often finding actions under the latter category to be preempted. *See, e.g.,* Mobile Mechanical Ass'n v. Carlough, 664 F.2d 481, 487 (5th Cir. 1981) (preempting suit for tortious interference with economic advantage); Palm Beach Co. v. Journeymen's Union, Local 157, 519 F. Supp. 705, 714 (S.D.N.Y. 1981) (holding that "business torts do not raise significant enough state concerns for the state tort law to survive preemption"). For a discussion of the categories of activities that have been excepted from *Garmon,* see Smith, *supra* note 2, at 46-50.

42. The NLRA "balance of power" test, enunciated in Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976), proscribes state regulations and causes of action which Congress intended to remain unprotected. The inquiry focuses on whether the state action impermissibly upsets the balance of power between labor and management by interfering with the role served by the free play of economic forces. *Id.* at 149-150.

43. 377 U.S. 252 (1964).

44. *Id.* at 260. *Morton,* while not an NLRA case, established the balancing test principle under section 303 of the LMRA, and held that state-imposed liability on a union engaged in a legal strike "upset[s] the balance of power between labor and management expressed in our national labor policy." *Id. See also* Dowling, *Interstate Commerce and State Power,* 27 VA. L. REV. 1 (1940) (congressional negative will be presumed where unreasonable interference with national interests would result). The Supreme Court adopted the Dowling test in 1945 for purposes of determining preemption of state law under the dormant commerce clause. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). Although the analogy drawn from the Dowling test to the NLRA/LMRA balance-of-power test is not complete, the example is helpful in understanding the Supreme Court's approach to Congress' silence on a topic having a preemptive effect on state law. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (dictum).

45. *Morton,* 377 U.S. at 260. *See Machinists,* 427 U.S. at 150. In New York Tel. Co. v. New York Dep't of Labor, 440 U.S. 519, 533-40 (1979), a plurality of the Court attempted to narrow the applicability of the balance-of-power test. The Court upheld a state unemployment compensation statute authorizing the payment of benefits to strikers with the primary financial burden falling on the employer. *Id.* at 523-24. Three justices reasoned, in part, that the balance-of-power doctrine was not as applicable where the state law was one of general applicability

power preemption doctrine focuses on actual conflict. This doctrine is based on a substantive right, and is not based on any deference to the primary jurisdiction of the NLRB.[46] An exception to preemption may result if the court finds that Congress did not intend to preempt a particular state regulation.[47]

2. *NLRA preemption of workers' compensation discharge claims*

In *Peabody Galion v. Dollar,*[48] one of the first cases to analyze the effect of federal labor law on workers' compensation discharge claims,[49] the em-

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rather than specifically directed at the union-management relationship in spite of its effect. *Id.* at 533-35. While it is not clear just how the present Court views this general applicability limitation, the two balance-of-power challenges to state laws subsequent to *New York Tel.* did not result in preemption. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (upholding mandatory minimum health-care benefits in employee benefit insurance policies); Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (upholding breach-of-contract and misrepresentation claims brought against employer by replacement workers who had been displaced by returning strikers despite previous assurances). For examples of lower court applications of the balance-of-power test, see Gould, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations, 750 F.2d 608, 611 (7th Cir. 1984) (state statute prohibiting state agencies from doing business for three years with employers who were guilty of NLRA violations was preempted as impermissible interference with federal scheme); Massachusetts Nurses Ass'n v. Dukakis, 570 F. Supp. 628, 640 (D. Mass. 1983) (upholding state statute aimed at reducing hospital costs which established limitations on wage increases), *aff'd,* 726 F.2d 41 (1st Cir. 1984); Golden State Transit Corp. v. City of Los Angeles, 520 F. Supp. 191, 193-94 (C.D. Cal. 1981) (enjoining City of Los Angeles from allowing plaintiff's taxicab franchise to expire while plaintiff was embroiled in labor dispute with its drivers), *vacated,* 686 F.2d 758 (9th Cir. 1982), *cert. denied,* 459 U.S. 1105 (1983).

46. *Belknap,* 463 U.S. at 498-99; *New York Tel.,* 440 U.S. at 527-33; *Machinists,* 427 U.S. at 138-41. *See generally* Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337 (1972) (distinguishing basis of substantive and primary jurisdiction preemption and proposing broader use of the substantive balance-of-power test).

47. Because Congress did not specifically designate the preemptive effect of the NLRA/LMRA, see *supra* note 22, the Court's preemption doctrines are necessary (1) to infer Congress' intent to preempt conflicting state laws under the supremacy clause and (2) to determine which state laws conflict. The ultimate justification for preemption under the supremacy clause, however, remains congressional intent and, accordingly, specific evidence of Congress' desire to leave a matter to state regulation must override the applicable preemption doctrine. *See, e.g.,* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (upholding pension fund statute potentially altering the balance of power between labor and management because Court found evidence that Congress intended states to be free to regulate in the area).

48. 666 F.2d 1309 (10th Cir. 1981).

49. Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980), apparently is the only case addressing preemption of a workers' compensation discharge claim prior to *Peabody.* In *Cook,* the plaintiff grieved a discharge for absences following a compensation award, but did not raise a claim of retaliation. An arbitrator found just cause for the termination. When the employee subsequently filed a suit in tort for retaliatory discharge, the appellate court ordered the case dismissed because a collective bargaining agreement "is an effort to erect a system of industrial self government." *Id.* at 405, 407 N.E.2d at 98. *Contra* Wyatt v. Jewel Co., 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982) (union employee not precluded from filing workers' compensation discharge claim).

ployer argued that the NLRA preempted an Oklahoma statute. As it applied to union employees, the statute created a tort cause of action for employees who had been discharged in retaliation for filing workers' compensation claims.[50] The *Peabody* court applied each of the relevant NLRA preemption doctrines[51] and first found that the NLRA did not expressly address the employee's claim.[52] Next, the court found the *Garmon* rule inapplicable because wrongful discharge in the workers' compensation context could not even arguably be characterized as an unfair labor practice prohibited by section 8 of the NLRA.[53] Alternatively, the *Peabody* court pointed out that, even if the *Garmon* rule were applicable, the workers' compensation discharge claim would fall within the class of exceptions to the rule because retaliatory discharge torts not related to union activity were only peripherally related to the policies of the NLRA.[54] The *Peabody* court also concluded that the balance-of-power preemption doctrine was inapplicable.[55] The court reasoned that the claim would not upset the balance of power between labor and management because it could not be classified an "essential aspect of the economic forces which enter into the shaping of viable labor agreements."[56]

Peabody's comprehensive NLRA preemption analysis was accepted in the few cases that subsequently addressed the issue in the context of workers' compensation discharge claims.[57] After *Peabody*, however, employers shifted the preemption analysis away from the NLRA and began to argue that section 301 of the LMRA preempted state retaliatory and wrongful discharge

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50. *Peabody*, 666 F.2d at 1313 (citing OKLA. STAT. tit. 85, §§ 5-7 (1981)).

51. NLRA preemption of state laws which curtail employees' section 7 rights was inapplicable in this context. The employer argued primary jurisdiction and balance-of-power preemption because employers have no rights under section 7.

52. *Id.* at 1316. The "clearly prohibited" aspect of primary jurisdiction preemption did not apply, because, although sections 8(a)(3) and (a)(4) prohibit employers from discharging employees for exercising their section 7 rights to unionize and collectively bargain, it does not address discharge in any other context. 29 U.S.C. § 158(a)(4) (1982).

53. *Peabody*, 666 F.2d at 1316. The court reasoned that the NLRB could not have analyzed the retaliatory discharge claim as an unfair labor practice because the filing of a workers' compensation claim could not even arguably be characterized as union activity. *Id.* The NLRB subsequently held that an individual who files a workers' compensation claim has not engaged in activity protected by section 7. Central Georgia Elec. Membership Corp., 269 N.L.R.B. 635 (1984).

54. *Peabody*, 666 F.2d at 1316. For some representative cases, see *supra* note 41.

55. *Peabody*, 666 F.2d at 1318.

56. *Id.* at 1316. The *Peabody* court also relied on the fact that the law was one of "general applicability" and not merely aimed at union employment relationships. *Id.* at 1317. *See also New York Tel. Co.*, 440 U.S. at 533 (Court has "consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to preempt laws directed specifically at concerted activity").

57. *See* Dority v. Green Country Castings Corp. 727 P.2d 1355, 1359 (Okl. 1986) (NLRA did not preempt Oklahoma's statutory workers' compensation discharge claim, citing *Peabody* with approval). *Accord* Taylor v. Tsekeris, 163 Ill. App. 3d 195, 516 N.E.2d 562 (1987).

claims.[58] The current controversy over workers' compensation discharge claims has ripened under the section 301 preemption doctrine.[59]

B. Preemption Under Section 301 of the LMRA

1. Section 301 preemption prior to Lueck

Section 301 of the LMRA[60] expressly grants the federal courts jurisdiction over suits involving the breach of collective bargaining agreements. The Supreme Court, in *Textile Workers v. Lincoln Mills,*[61] held that Congress also intended the federal courts to create a body of federal common law to be used in section 301 suits.[62]

In 1962, the Supreme Court decided *Charles Dowd Box Co. v. Courtney,*[63] and *Teamsters Local v. Lucas Flour Co.,*[64] two key cases in section 301's development. In *Charles Dowd,* the Court held that while state courts have

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58. The Supreme Court's decision in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), prompted employers to use section 301 to preempt tort claims brought against them by their employees because the Court specifically held that section 301 could preempt state tort claims. For an example of how, within weeks of the *Lueck* decision, it was being cited and argued in cases where section 301 preemption was not even at issue, see Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985). After *Lueck,* the digests filled with caselaw involving section 301 preemption of employee tort claims where employers cited to *Lueck* as a matter of course. *See supra* note 12 (citing some representative cases).

59. *See generally* Comment, 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) [hereinafter Comment, Midgett v. Sackett] (discussing impact of *Lueck* on Illinois' workers' compensation discharge claims as applied to union employees and predicting preemption because of federal policy favoring arbitration of individual employee grievances). *Accord* Kinyon and Rohlik, *supra* note 8, at 63.

60. Section 301(a), 29 U.S.C. § 185(a) (1982) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."

61. 353 U.S. 448 (1957).

62. *Id.* at 456-57. The issue in *Textile Workers* was whether a federal court hearing a section 301 claim could fashion a remedy based only on federal labor law, or whether it was bound by the remedy offered by the relevant state contract law principle. The Court held that state law should not bind a federal court in section 301 claims, and upheld the injunction ordered by the lower court as proper under the federal section 301 common law enunciated in the case. *Id.* at 457. Justice Frankfurter, in dissent, thought the majority had transformed a "plainly procedural section . . . into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touchy problems raised by collective bargaining." *Id.* at 461 (Frankfurter, J., dissenting). Justice Frankfurter further stated that the majority had incorrectly relied on a few isolated statements in the legislative history to support its conclusion. *Id.* at 462.

63. 368 U.S. 502 (1962).

64. 369 U.S. 95 (1962).

concurrent jurisdiction over section 301 claims, they must apply the federal common law developed by *Textile Workers* and its progeny.[65] The *Lucas Flour* Court added that Congress intended this body of federal common law, as foreseen in *Textile Workers,* to prevail over inconsistent local rules.[66] The Court concluded that an employee could not bring a breach of labor contract claim under state contract law and thereby avoid section 301. Claims arising out of bargaining contracts had to be brought under section 301 and resolved by reference to section 301 federal common law.[67]

Lucas Flour resolved only section 301 preemption as applied to state contract law.[68] It did not resolve whether an employee could avoid bringing a section 301 claim by couching the same facts as a state tort claim.[69]

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65. 368 U.S. at 514. The Court's conclusion that section 301 permitted concurrent jurisdiction of state and federal courts went against some strong dicta in earlier cases stating that section 301 vested jurisdiction exclusively in federal courts because only federal courts are mentioned in the statute. Association of Westinghouse Employees v. Westinghouse Elec. Corp., 210 F.2d 623, 625 (3rd Cir. 1954), *aff'd,* 348 U.S. 437 (1955); International Plainfield Motor Co. v. Local 343, 123 F. Supp. 683, 691 (D.N.J. 1954).

Another important jurisdictional issue arose as to whether the *Garmon* rule could preempt a section 301 claim in favor of the NLRB's primary jurisdiction if the breach of the labor contract alleged in the section 301 claim constituted an arguably unfair labor practice. In Smith v. Evening News Ass'n, 371 U.S. 195, 201 (1962), the Court held that the *Garmon* rule was inapplicable to section 301 claims. *See also* Note, Smith v. Evening News Ass'n, Garmon *Rule of Pre-emption of State Court Jurisdiction Over Unfair Labor Practices Held Inapplicable in Suits Under Section 310 of the National Labor Relations Act,* 31 FORDHAM L. REV. 829 (1963) (approving of *Smith*). Nevertheless, lower court decisions have held that if the pivotal issue in a section 301 claim involves a matter that expressly falls within the exclusive jurisdiction of the Board, the claim will be preempted by the NLRA. Baker v. Newspaper & Graphic Communications Local 6, 628 F.2d 156, 163 (D.C. Cir. 1980); West Point-Pepperell, Inc. v. Textile Workers Union, 559 F.2d 304, 306 (5th Cir. 1977); Local 17, Int'l Bhd. of Teamsters v. Coast Cartage Co., 103 L.R.R.M. 3053, 3054 (D. Colo. 1980). *See generally* Feldesman, *Section 301 and the National Labor Relations Act,* 30 TENN. L. REV. 16, 18 (1966) (discussing jurisdictional interplay between statutes).

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

67. *Id.* The lower court, the Washington Supreme Court, accepted jurisdiction of a section 301 claim but resolved the claim using state contract law. The Supreme Court held that this use of state law was error but did not reverse because the result reached was consistent with federal law. *Id.* at 105.

68. *See* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers, 376 F.2d 337, 339-40 (6th Cir. 1967) ("after *Lucas Flour,* state law does not exist to enforce collective bargaining agreements"), *aff'd,* 390 U.S. 557, *reh'g denied,* 391 U.S. 929 (1968).

69. Pre-*Lueck* section 301 preemption focused on state claims that were merely contract derivative tort actions. The courts focused on whether the tort actually "sounded in contract" as a breach of a collective bargaining agreement. *See, e.g.,* Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348, 1350-51 (9th Cir. 1984) (plaintiffs wrongful discharge claim was thinly-disguised attempt to circumvent collective bargaining agreement grievance procedures). *Accord* Oglesby v. RCA Corp., 752 F.2d 272, 275-76 (7th Cir. 1985); Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1474-75 (9th Cir. 1984). *See also* Fristoe v. Reynolds Metal Co., 615 F.2d 1209, 1212 (9th Cir. 1980) (state claim alleging common law wrongful discharge in violation of labor contract and union's breach of fiduciary duty must be brought as section

Ultimately, lower courts were forced to decide this unresolved issue because employers began to allege that section 301 preempted state tort, as well as state contract actions.[70]

Employers offered two reasons why section 301 should be given broader preemptive power. First the legal boundaries of NLRA preemption were fairly settled by the 1980's, making extension of its preemptive scope unlikely.[71] Second, some states were expanding the rights extended to employees through both old and new tort actions.[72] Some of the newer torts, such as retaliatory discharge, were initially only available to non-union employees, and, therefore, were no threat to union employers' interests.[73] When some states extended the coverage of retaliatory discharge claims to union employees, however, employers feared that the limited remedies and arbitration bargained for in labor contracts would be easily avoided by employees eager to obtain larger awards in state courts.[74] As a result, employers argued that section 301 preempted varied state tort actions as applied to union employees on the ground that they were nothing more than contract claims masquerading as torts. The Supreme Court first addressed the circumstances under which section 301 could preempt a state tort action in *Allis-Chalmers Corp. v. Lueck*.[75]

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301 claim). These courts did not discuss, nor had it been argued, whether section 301 could be used to preempt tort actions. It was not until *Lueck* that the Supreme Court held that section 301 could preempt a non-contractual cause of action or state law. *See infra* notes 75-89 and accompanying text.

70. *See* brief for petitioner at 13-18, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (No. 83-1748) (arguing that section 301 must preempt more than state contract actions by union employees because *Lucas Flour* did not limit itself to preemption of inconsistent state contract law and most circuits did not either).

71. *See generally* Taldone, *Federal Preemption of Wrongful Discharge Claims of Union Employees*, 12 EMPLOYEE REL. L.J. 33, 34 (1986); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 281-83 (1980) (discussing unlikely extension of *Garmon* to new areas in light of recent Supreme Court precedent). The *Garmon* rule had only rarely been applied to personal tort claims which were usually excepted from *Garmon* in deference to the high state interest in them. *See supra*, note 41. *See generally* Smith, *supra* note 2, at 45-50 (1985) (discussing exceptions from the *Garmon* rule).

72. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (recognizing retaliatory discharge claim as violative of public policy); Kelsay v. Motorola, 74 Ill. 2d 172, 384 N.E.2d 353 (1983) (same). For a state-by-state survey of common law wrongful discharge decisions, see *1984 Report of the Employment-at-Will Subcommittee, Employment and Labor Relations Committee*, A.B.A. LITIGATION SEC. (1985) [hereinafter *A.B.A. 1984 Report*].

73. *See, e.g.*, Kelsay v. Motorola, 74 Ill. 2d 172, 176, 384 N.E.2d 353, 355 (1978) (providing that new Illinois tort of retaliatory discharge would only apply to at-will employees). *See also* ABA 1984 REPORT, *supra* note 72.

74. *See* Midgett v. Sackett-Chicago, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) (Moran, J., dissenting). *See generally* Comment, Midgett v. Sackett, *supra* note 59 (discussing added expense of defending tort claims instead of grievances and their unpredictability).

75. 471 U.S. 202 (1985).

2. The Lueck *preemption test*

In *Lueck,* the Supreme Court held that the labor policies articulated in *Lucas Flour* required Section 301's preemptive effect to extend beyond state suits alleging contract violations.[76] The *Lueck* Court was faced with an employee who brought a tortious bad-faith breach-of-contract claim in state court instead of pursuant to procedures required by his collective bargaining agreement. The employee claimed that the employer had in bad faith breached its contractual duty to provide certain insurance coverage.[77] The Wisconsin Supreme Court had held that section 301 did not preempt the tort because it was distinct from the ordinary bad-faith breach-of-contract claim that would have been preempted under *Lucas Flour.*[78]

The United States Supreme Court reversed the Wisconsin Supreme Court and held that section 301 preempted the bad-faith tort claim.[79] The Court first held that, while a state's characterization of its own tort action is a question of state law, preemption under section 301 is a question of federal law.[80] The Court further stated that virtually any contract claim can be cast as a tort claim, and that to allow such a technical distinction would injure federal labor policy.[81] The Court then established a test to determine whether

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76. *Id.* at 210. In particular, the Court cited the federal policy of encouraging arbitration and discouraging litigation as a means of resolving labor disputes. Teamsters Local 174 v. Lucas Flóur Co., 369 U.S. 95, 104-05 (1962). The Supreme Court's "Steelworker's Trilogy" affirmed that federal policy favors grievance and arbitration mechanisms as the exclusive remedy for contractual wrongful discharge claims. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960); United Steelworkers v. Warriors and Gulf Navigation Co., 363 U.S. 574, 585 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). The grievance and arbitration procedure may be bypassed and a section 301 suit brought, however, when the union breaches its duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 177 (1967). *See also* D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1488 (7th Cir. 1985) (citing further exceptions, i.e., (1) where the employer repudiates the contract; (2) where grievance would be futile; and (3) where the union has been relieved of its obligation).

77. *Lueck,* 471 U.S. at 206. The labor contract provided a non-occupational disability insurance plan for all employees. *Id.* at 204.

78. *Id.* at 207; Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 566, 342 N.W.2d 699, 702-03 (1984). The Wisconsin Supreme Court reasoned that a section 301 suit arose out of a violation of a labor contract, and that the employee's claim was a tort claim involving bad faith. Under Wisconsin law, the tort of bad faith is distinguishable from a bad-faith breach-of-contract claim—though a breach of duty exists as a consequence of the relationship established by contract, it is independent of that contract. Therefore, the Wisconsin Court stated the violation of the labor contract was "irrelevant to the issue of whether the [employer] had exercised bad faith in the manner in which they [sic] handled *Lueck's* claim." Accordingly, the state court did not view the action as a section 301 suit. *Id.* at 566, 342 N.W.2d at 703.

79. *Lueck,* 471 U.S. at 220-21.

80. *Id.* at 210.

81. *Id.* at 211. The court stated:

> Were state law allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in *Lucas Flour* would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances.

a state tort action should be preempted. Under the *Lueck* test, a state claim will be preempted when its resolution is substantially dependent upon an analysis of the parties' collective bargaining agreement.[82] The *Lueck* Court concluded that section 301 preempted the bad-faith tort because the employee's right to insurance coverage only existed as a result of the fact that his union contract provided for such insurance.[83]

Although *Lueck* expanded the preemptive effect of section 301, the Court was also concerned about possibly over-broad applications of the test it had established.[84] The Court stated that not every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement is necessarily preempted by section 301.[85] The Court added that it passed no judgment on whether a non-negotiable, state-imposed duty that did not create similar problems of contract interpretation would be preempted under similar circumstances.[86] The *Lueck* Court concluded that its test should be applied on a case-by-case basis, always comparing the state cause of action to the labor contract in question.[87]

After *Lueck,* it was clear that section 301 would preempt state claims that could not have been brought without the existence of the labor contract.[88] Where, however, a state cause of action specifically protected a guaranteed non-negotiable state right, the limiting language in *Lueck* seemed to indicate that such a claim would not be preempted.[89] Just how broadly or narrowly lower courts would construe *Lueck's* preemptive scope was difficult to predict

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> As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate. Exclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining agreements accomplished under a uniform body of federal substantive law.'

Id. (quoting Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962)).

82. *Lueck,* 471 U.S. at 220-21. Earlier in the opinion, the Court phrased the preemption test as whether evaluation of the tort claim is "inextricably intertwined with consideration of the terms of the labor contract" and "if the state law purports to define the meaning of the contractual relationship, that law is pre-empted." *Id.* at 213.

83. *Id.* at 218-19.

84. *Id.* at 220.

85. *Id.* at 211. As an illustration the court stated, "Clearly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Id.* at 212.

86. *Id.* at 212 n.6.

87. *Id.* at 220.

88. *See* International Bhd. of Elec. Workers. v. Hechler, 107 S. Ct. 2161 (1987) (common law claim of breach of duty to provide employees with a safe workplace would be preempted under § 301 and *Lueck* where labor union only had legal duty to provide its members with safe workplace because of labor contract).

89. Caterpillar Inc. v. Williams, 107 S. Ct. 2425, 2431 (1987) (mere fact that employee could have brought suit under § 301 for violation of labor contract did not preclude employee from alleging that same conduct gave rise to breach of an individual employment contract under state law because such claim was independent of labor contract). *See* Taldone, *supra* note 71, at 40.

because language in the opinion could be used to support either possibility.[90]

3. *Workers' compensation discharge claims and section 301 preemption in Illinois prior to* Lingle

Illinois recognized workers' compensation discharge claims in 1978.[91] Initially, workers' compensation discharge claims were only available to nonunion employees.[92] Then, in *Midgett v. Sackett-Chicago, Inc.*,[93] the Illinois Supreme Court extended the tort's protection to unionized employees covered by collective bargaining agreements.[94] *Midgett* preceded *Lueck*, however, so it remained to be seen how the Illinois Supreme Court would analyze an employer's allegation that section 301 preempted workers' compensation discharge claims as applied to union employees.[95]

In *Gonzalez v. Prestress Engineering Corp.*,[96] the Illinois Supreme Court directly faced the preemption issue.[97] The *Gonzalez* court concluded that workers' compensation discharge claims by union employees were not preempted in spite of the fact that the court had preempted similar state claims just prior to *Gonzalez*.[98] The court relied on the important state interest

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90. *Compare* Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 104 (2d Cir. 1987) (preemption only results when labor contract must be referred to when resolving state claim; focusing on the *Lueck* test language and the limits of § 301 preemption as set forth in opinion) *with* Lingle v. Norge. Div. of Magic Chef, Inc., 618 F. Supp. 1448, 1449 (S.D. Ill. 1985) (preemption results whenever a state-law claim "would undermine the mutually agreed upon procedures provided for in that agreement"; focusing on federal labor policies served by § 301 *Lueck* preemption). *See also supra* note 14. *See generally* Kinyon and Rohlik, *supra* note 8, at 38-45 (discussing ambiguities, possible effects and interpretations of *Lueck* and its preemption test).

91. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). In *Kelsay*, the court held that the important state policy interest in protecting the right to workers' compensation as granted by the legislature required that at-will employees be able to recover damages from employers who discharge them solely for exercising their right. *Id.* at 175, 384 N.E.2d at 357.

92. *Id.* at 174, 384 N.E.2d at 357.

93. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

94. *Id.* at 150, 473 N.E.2d at 1283-84. The court stated it would be unfair to allow nonunion employees to recover punitive damages in workers' compensation discharge claims while limiting union employees to their contractual remedies. *Id. See supra* note 19 and accompanying text.

95. The section 301 preemption issue was not before the *Midgett* court because *Lueck* had not yet been decided and the employer did not raise it. *Midgett*, 105 Ill. 2d at 150, 473 N.E.2d at 1285.

96. 115 Ill. 2d 1, 503 N.E.2d 308 (1986), *cert. denied*, 107 S. Ct. 3428 (1987).

97. *Id. Gonzalez* was originally a companion case to *Midgett* and, on remand, the employer argued that even though the worker's compensation discharge claim was now available in Illinois to union employees, section 301 preempted the claim under the *Lueck* test. *Id.*

98. In Koehler v. Illinois Gulf Central R.R. Co., 109 Ill. 2d 473, 488 N.E.2d 542 (1985), *aff'd*, 463 N.E.2d 918, *cert denied*, 106 S. Ct. 3297 (1986), the court held that the Railway Labor Act preempted a retaliatory discharge claim. In Bartley v. University Asphalt Co., 111 Ill. 2d 318, 489 N.E.2d 1367 (1986), the court applied the *Lueck* test and held that section 301 preempted an employee's claim alleging his union civilly conspired with his employer. One

served by the Illinois Workers' Compensation Act and that the right to workers' compensation is non-negotiable and not affected by collective bargaining.[99] The *Gonzalez* court reasoned that a state cause of action based on such a non-negotiable right is independent of any contract provision and must, therefore, fall within one of the exceptions to preemption foreseen by *Lueck*.[100]

In contrast to the agreement among Illinois state courts, the Seventh Circuit's federal district courts sharply disagreed over section 301's preemptive effect on workers' compensation discharge claims. Shortly after *Lueck*, in *Vantine v. Elkhart Brass Mfg. Co.*,[101] the Seventh Circuit Court of Appeals held that the Indiana Supreme Court would not extend Indiana's workers' compensation discharge tort to employees covered by collective bargaining agreements if presented with the issue.[102] The *Vantine* court found Indiana's workers' compensation law to be rooted in contract and, therefore, a claim under it could not be independent of the labor contract.[103] The court's decision, while indicative of the way it would view a workers' compensation discharge claim in Illinois, did not bind the federal district courts applying Illinois law.[104] In addition, preemption was not actually at issue in *Vantine*—the court only used preemption in its analysis of whether to extend the tort's

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labor commentator interpreted *Koehler* and *Bartley* to effectively overrule *Midgett*, and thought it virtually certain that the Illinois Supreme Court, in *Gonzalez*, would preempt the workers' compensation discharge claim. *See* Henry, *Retaliatory Discharge: Status of the Tort in Illinois*, LAB. L.J. 146, 154-55 (March 1987).

99. *Gonzalez*, 115 Ill. 2d at 9-13, 503 N.E.2d at 311-13.

100. *Id. See supra* notes 83-87 and accompanying text. *Gonzalez* made it clear that section 301 did not preempt workers' compensation discharge claims in Illinois. Byrd v. Aetna Casualty and Surety Co. 152 Ill. App. 3d 292, 298, 504 N.E.2d 216, 221 (1987). *Accord* Taylor v. Tsekeris, 163 Ill. App. 3d 195, 516 N.E.2d 562 (1987). Moreover, after *Gonzalez*, two Illinois appellate courts held that section 301 does not preempt any state causes of action that are based on important state public policies. Richardson v. Illinois Bell Tel. Co., 156 Ill. App. 3d 1006, 1009, 510 N.E.2d 134, 136 (1987) (any state tort action designed to protect the public exists separate and apart from rights created by labor contract); Krasinski v. United Parcel Service, 155 Ill. App. 3d. 831, 840, 508 N.E.2d 1105, 1110 (1987) (any state tort action "firmly rooted" in public policy is not preempted under the *Lueck* test). Other states which have addressed the issue under *Lueck* also have not preempted the tort claim. Bonner v. Fleming Companies, Inc., 734 S.W.2d 764 (Tex. Ct. App. 1987); MGM Grand Hotel-Reno, Inc. v. Insley, 728 P.2d 821 (Nev. 1986).

101. 762 F.2d 511 (7th Cir. 1985).

102. *Id.* at 517. The issue was before the Seventh Circuit Court of Appeals under diversity jurisdiction and involved the interpretation of state law. *Id.* at 516.

103. *Id.* at 517. This "rooted-in-contract" analysis is analogous to the *pre-Lueck* test for section 301 preemption, i.e., if the state claim "sounds in contract", it must be brought under federal law as a section 301 claim because it is not actually a tort claim at all. *See supra* note 69.

104. *See* Waycaster v. AT & T Technologies, Inc., 636 F. Supp. 1052, 1058 (N.D. Ill. 1986) (recognizing that *Vantine* was not binding precedent in Illinois federal district courts), *aff'd*, 823 F.2d 1091 (7th Cir. 1987).

coverage to union employees.[105] In fact, after *Vantine,* the majority of Illinois federal district courts held that section 301 did not preempt Illinois' workers' compensation discharge tort.[106]

4. Section 301 preemption of workers' compensation discharge claims in the other Federal Circuit Courts of Appeals

Prior to *Lingle,* three other Federal Circuit Courts of Appeals had addressed the effect of *Lueck* on workers' compensation discharge claims. In *Herring v. Prince Macaroni of New Jersey, Inc.,*[107] the Third Circuit addressed the issue while deciding whether New Jersey state courts would extend the tort to union employees. The *Herring* court held that the New Jersey Supreme Court would extend the tort's coverage and,[108] in dicta, further stated that section 301 would not preempt such claims.[109] The court emphasized the language in *Lueck* which limited the preemptive effect of section 301,[110] but did not actually apply the *Lueck* test.[111]

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105. The *Vantine* court never reached the federal preemption issue because the court held that the Indiana Supreme Court would not elect to extend its workers' compensation discharge tort to union employees. *Vantine,* 762 F.2d at 517. Any comments made on the topic, therefore, were dicta. Byrd v. Aetna Casualty Surety Co., 152 Ill. App. 3d 292, 298, 504 N.E.2d 216, 221 (1987).

106. *See* La Buhn v. Bulkmatic Transport Co., 644 F. Supp. 942, 949 (N.D. Ill. 1986) (no preemption); Orsini v. Echlin, Inc., 637 F. Supp. 38, 42 (N.D. Ill. 1986) (same); Daugherty v. Lucky Stores, Inc. 603 F. Supp. 975, 978 (C.D. Ill. 1985) (same). *Contra* Waycaster v. AT & T Technologies, Inc., 636 F. Supp. 1052, 1058 (N.D. Ill. 1986) (preemption), *aff'd,* 822 F.2d 1091 (7th Cir. 1987); Lingle v. Norge Div. of Magic Chef, Inc., 618 F. Supp. 1448, 1449 (S.D. Ill. 1985) (same). Furthermore, the Illinois federal district courts applied *Lueck* independently of the *Vantine* decision, with the *La Buhn* court openly criticizing *Vantine. La Buhn,* 644 F. Supp. at 650-51. For federal district court resolution of the workers' compensation discharge claim issue outside the Seventh Circuit, see Tombley v. Ford Motor Co., 666 F. Supp. 972 (E.D. Mich. 1987) (declining to preempt workers' compensation discharge claim under § 301 because public policy and civil rights protections of state law confer non-negotiable state rights and exist indepen,dently of private agreements); Sutton v. Southwest Forest Industries, 643 F. Supp. 662 (D. Kan. 1986) (declining to preempt workers' compensation discharge claim under § 301 because action is independent of labor contract); Benton v. Kroger Co., 635 F. Supp. 56, 58 n.1 (S.D. Tex. 1986) (declining to preempt workers' compensation discharge claim under § 301 because action does not interfere with union organization or collective bargaining and does not tend to conflict with federal labor law). *Accord* Smith v. Capital Mfg. Co., 626 F. Supp. 110, 112-13 (S.D. Ohio 1985). *Contra* Smith v. Union Carbide Corp., 664 F. Supp. 290, 292-93 (E.D. Tenn. 1987); Edwards v. Western Mfg. Div. of Montgomery Elevator Co., 641 F. Supp. 616, 617-19 (D. Kan. 1986) (declining to follow *Sutton*).

107. 799 F.2d 120 (3rd Cir. 1986).

108. *Id.* at 124.

109. *Id.* at 124 n.2.

110. *Id.* The *Herring* court stated that workers' compensation rights are rooted in state law, rather than in the collective bargaining agreement. *Id.*

111. *See id.*

In *Johnson v. Hussman Corp.*,[112] the Eighth Circuit squarely faced the section 301 preemption issue[113] and held that section 301 preempted Missouri's workers' compensation discharge tort claim as applied to a union employee.[114] The *Johnson* court's application of the *Lueck* test, however, merely consisted of a conclusory statement that the state claim was preempted because its resolution was substantially dependent upon analysis of the labor contract.[115] The court did not explain what circumstances made it necessary to refer to the labor contract in resolving the tort claim. *Herring* and *Johnson* are of little help in resolving the issue of preemption of workers' compensation discharge claim because of their cursory applications of the *Lueck* test.

After *Johnson,* the Second Circuit Court of Appeals addressed the issue in *Baldracchi v. Pratt & Whitney Aircraft Div.*[116] In a more thorough application of the *Lueck* test than either the *Herring* or *Johnson* courts conducted,[117] the court concluded that section 301 did not preempt the claim. In *Baldracchi,* an employee filed suit in state court, instead of filing an unjust discharge grievance under her union contract, and alleged that she had been fired for filing a workers' compensation claim in violation of Connecticut law.[118] The employer removed the case to federal court and argued that section 301 preempted the state claim.[119] The court first examined the nature of the statutory workers' compensation discharge claim and

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112. 805 F.2d 795 (8th Cir. 1986).

113. *Id.* at 796. In the earlier two federal court of appeals decisions that had considered the preemptive effect of section 301 on workers' compensation discharge claims, the courts had to decide whether the respective state supreme courts would even extend the tort to union employees. While section 301 preemption was discussed in each case, it was not an issue before the courts. *See* Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120 (3rd Cir. 1986); Vantine v. Elkhart Brass Mfg. Co, 762 F.2d 511 (7th Cir. 1985).

114. Johnson v. Hussman Corp., 805 F.2d 795 (8th Cir. 1986).

115. *Id.* The *Johnson* court stated: "Here, applicant's state tort claim for retaliatory discharge for filing a workers' compensation claim has been preempted by federal law because resolution of that claim is substantially dependent upon analysis of the term of an agreement between the parties in a labor contract." *Id.* It is also possible that some judges on the Eighth Circuit Court of Appeals may be looking to reevaluate *Johnson* in an en banc decision. In Wolfe v. Central Mine Equip. Co., 126 L.R.R.M. 2247, 2248 (8th Cir. 1987), a three judge panel wrote in response to an employee's argument that a workers' compensation discharge claim was independent of the labor contract: "On the face of it, these arguments have some appeal. This panel, however is bound by *Johnson.* Only the court en banc may overrule a decision of a panel. The same arguments that Wolfe wages here could have been presented with equal force in *Johnson* itself . . . ." The *Wolfe* opinion was subsequently withdrawn when a rehearing en banc was granted. *Wolfe,* 827 F.2d at 372.

116. 814 F.2d 102 (2d Cir. 1987).

117. The *Baldracchi* court attempted to analyze the workers' compensation discharge claim in the context of each aspect of the *Lueck* opinion: (1) federal policy, (2) the "substantially-dependent" test and (3) the Supreme Court's own limitations placed on that test. *See Baldracchi,* 814 F.2d 103-106.

118. *Id.* at 103.

119. *Id.*

concluded that resolution of the claim was completely independent of the labor contract's "just cause" provision.[120] The court reasoned that, in order to defend the state action on the merits, the employer would not have to prove that the employee had been fired for just cause as required by the contract.[121] Instead, the employer would merely have to show that the employee's filing of a workmens' compensation claim did not prompt the employee's discharge—whether the discharge was justified in any other way would be irrelevant.[122]

The *Baldracchi* court also addressed the language in *Lueck* intended to limit the preemptive effect of its test to a narrow range of truly dependent state claims,[123] and concluded that workers' compensation discharge claims were not intended to be preempted. The court noted that the rights provided by Connecticut's workers' compensation statute could not be bargained away by contracting parties.[124] The court further relied on *Lueck's* statement that section 301 does not grant contracting parties the right to bargain for what is illegal under state law and concluded that any attempt to cut off employees' right to workers' compensation would be illegal.[125]

The *Baldracchi* court was the last federal court of appeals prior to the Seventh Circuit in *Lingle* to rule on the issue.[126] *Baldracchi,* moreover, presented a complete and persuasive analysis of *Lueck*'s effect on workers' compensation discharge claims and could have been persuasive authority in any other circuit's disposition of the issue. The Seventh Circuit, however, read section 301's preemptive scope more broadly than many other courts.[127] A result founded on the ambiguity of the *Lueck* opinion which made conflicting interpretations more likely. Likewise, two Supreme Court cases addressing section 301 preemption subsequent to *Lueck* did little to clear up the ambiguity because they shed no new light on the application of the test.[128] It was against this background of conflicting federal and state decisions that the Seventh Circuit decided *Lingle.*

II. *LINGLE v. NORGE DIV. OF MAGIC CHEF, INC.*

A. Facts and Procedure

In the first of the two companion cases appealed from the Southern District of Illinois,[129] Jonna Lingle brought suit in state court alleging that

120. *Id.* at 105.

121. *Id.*

122. *Id. See also Lingle,* 823 F.2d at 1053 (Ripple, J., dissenting).

123. *Baldracchi,* 814 F.2d at 106.

124. *Id.*

125. *Id.* (citing *Lueck,* 471 U.S. at 213).

126. *See Lingle,* 823 F.2d at 1048.

127. *See infra* notes 101-106, 163-170 and accompanying text.

128. International Bhd. of Elec. Workers v. Hechler, 107 S. Ct. 2161 (1987) (preempting state claim for breach of union's duty to provide safe workplace); Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987) (applying the well-pleaded complaint rule to § 301 preemption). *See also supra* notes 13, 14 and accompanying text.

129. Martin v. Carling National Breweries, No. 85-3321, slip op. (S.D. Ill. April 11, 1986);

her employer, Norge Division of Magic Chef, Inc., fired her for filing a claim under the Illinois Workers' Compensation Act.[130] Lingle had notified her employer that she had been injured on the job.[131] Lingle then filed a workers' compensation claim, but Norge fired her for allegedly filing a false claim.[132] The labor contract contained a "just cause" provision, and after Lingle's union filed a grievance on her behalf, she successfully arbitrated the claim and was reinstated with back pay.[133] Lingle's subsequent state court suit alleged retaliatory discharge and demanded general damages.[134] Norge did not argue section 301 preemption to the state circuit court, but instead removed the case to federal district court on the basis of diversity.[135] In federal court, Norge argued that Lingle's workers' compensation discharge claim was preempted by section 301 and should be dismissed for lack of subject matter jurisdiction.[136] Lingle argued that her claim was not preempted because it was independent of the labor contract under the *Lueck* test.[137] The district court relied on *Lueck* and held that Lingle's claim was preempted by section 301 because it was inextricably intertwined with the "just cause" provision of the contract.[138] Lingle appealed.

Martin v. Carling Nat'l Breweries,[139] the companion case to *Lingle,* was very similar to *Lingle* except that Martin alleged she was fired after she had informed her employer that she intended to file a workers' compensation claim.[140] Moreover, Martin did not pursue her rights under the collective bargaining agreement but, instead, filed her retaliatory discharge claim in an Illinois state court.[141] Carling removed the case to federal district court under 28 U.S.C. section 1441(b) on the theory that the claim raised a federal question.[142] In federal court, Carling argued that section 301 preempted Martin's workers' compensation discharge claim.[143] Martin argued that her

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Lingle v. Norge Div. of Magic Chef, Inc., 618 F. Supp. 1448 (S.D. Ill. 1985). *See also supra* note 105.

130. *Lingle,* 823 F.2d at 1034.

131. *Id.* at 1033.

132. *Id.*

133. *Id.* at 1034.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* The district court, relying on *Lueck,* reasoned that to allow an independent tort action for retaliatory discharge would undermine the mutually agreed upon procedures provided for in a labor contract. *Lingle,* 618 F. Supp. at 1449.

139. *See* No. 85-3322, slip op. (S.D. Ill. April 11, 1986).

140. *Lingle,* 823 F.2d at 1034.

141. *Id.*

142. *Id.* at 1035. Section 1441(b) provides: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . ." 28 U.S.C. § 1441(b) (1982). *See infra* notes 152-162 and accompanying test.

143. *Lingle,* 823 F.2d at 1035.

claim actually arose under state workers' compensation law and moved for the court to remand the case back to state court because 28 U.S.C. 1445(c) barred the removal of workers' compensation claims.[144] The district court denied Martin's motion to remand[145] and subsequently held that section 301 preempted her workers' compensation discharge claim, relying on its earlier decision in *Lingle* without opinion.[146] Martin appealed.

The issues presented in the appeals of these cases were (1) whether the plaintiffs' retaliatory discharge claims were removable[147] and, if so, (2) whether the claims were preempted by section 301.[148]

B. The Court's Rationale—Majority Opinion

The *Lingle* majority held that both of the workers' compensation discharge claims were properly removed to federal court and preempted by section 301.[149] The court stated that in order to reach the merits of a section 301 preemption defense after removal a federal court must first determine that it has subject matter jurisdiction over the case, and added that a federal court only has jurisdiction over properly removed cases.[150] The court then addressed and dismissed Martin's claim that section 1445(c) barred removal of the workers' compensation discharge claim because it arose under the Illinois Workers' Compensation Act.[151]

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144. 28 U.S.C. § 1445(c) provides: "A civil action in any state court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." Martin's argument that a common law tort claim could constitute "a civil action . . . arising under the workmen's compensation laws" of a state was new at the time. Two federal courts of appeals subsequently accepted the analogy. Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 105 (2d Cir. 1987); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3rd Cir. 1987).

145. *Lingle,* 823 F.2d at 1035.

146. *Id.*

147. *Id.* at 1035, 1037-42.

148. *Id.* at 1035, 1042-47.

149. *Id.* at 1047.

150. *Id.* at 1037. The court stated that it would be illogical to consider the substantive issue of federal preemption before it determined whether it had subject matter jurisdiction over the case. *Id.*

151. The court relied on a two step analysis to conclude that section 1445(c) did not bar removal of workers' compensation discharge claims. First, the court stated that a state's characterization of a tort claim as arising under its "workmens' compensation laws" does not bind a federal court because the interpretation of section 1445(c) is a matter of federal law. *Lingle,* 823 F.2d at 1039. Second, the statutory term "workmen's compensation laws" was not meant to include state common law tort claims. *Id.* The court relied, in part, on the fact that section 1445(c) was passed to help ease the burden on federal court dockets and not, by implication, for substantive reasons. S. REP. No. 1830, 85th Cong., 2d Sess. 7-8, *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3104, 3106. Moreover, the court found support for its conclusion in a desk reference publication used by federal agencies that defines workers' compensation as providing employees with limited no-fault compensation for injuries in exchange for the *elimination* of general tort rules. LARSON, WORKMEN'S COMPENSATION § 1.10 (desk ed. 1986) (emphasis added). The court reasoned that this definition could not possibly include a

The *Lingle* court next examined whether the plaintiffs' workers' compensation discharge claims raised federal questions and thereby were properly removed under 28 U.S.C. section 1441(b).[152] The Supreme Court has long held that under section 1441(b) federal jurisdiction exists only when a federal question is presented on the face of a well-pleaded complaint.[153] Furthermore, even a defense of federal preemption will not ordinarily give rise to federal jurisdiction under section 1441(b).[154] The court first stated that, although the usual test for a federal question looks only to the plaintiff's complaint for issues of federal law, a strict application of this well-pleaded complaint rule in section 301 preemption cases would prevent federal courts from ever hearing those cases because employees could easily avoid raising federal questions by careful drafting.[155] Finding this a danger to the federal interest in determining section 301's preemptive scope, the court held that it would apply the artful-pleading doctrine and look behind the face of the plaintiffs' complaints to determine whether the couching of their claims in state law terms was a mere ploy to avoid federal jurisdiction.[156] The court held that the test for a federal question in section 301 preemption cases should ask whether the state claim is sufficiently independent of the labor contract to avoid removal.[157] If the state claim was not found to be sufficiently independent of the contract, removal would then be proper.[158]

The *Lingle* court applied its test and concluded that the plaintiffs' claims were not sufficiently independent of the contract to avoid removal.[159] The court relied on Seventh Circuit precedent which had characterized various types of retaliatory discharge tort claims as analogous to wrongful discharge

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tort claim. *Lingle,* 823 F.2d at 1039 n.9. *Accord* Smith v. Union Carbide Corp., 644 F. Supp. 290, 291 (E. D. Tenn. 1987). *Contra* Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 105 (2d Cir. 1987) (§ 1445(c) reveals congressional intention not to interfere with workers' compensation rights including tort claims if based on those rights); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3rd Cir. 1986) (workers' compensation discharge claim "is part-and-parcel of the state's workers' compensation scheme").

152. *Lingle,* 823 F.2d at 1035. For the text of section 1441(b), see *supra* note 142.

153. Gully v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936). *See also* Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987) (addressing application of the well-pleaded complaint rule in context of § 301 preemption).

154. Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 12 (1983). *See generally* Comment, *Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule,* 51 U. CHI. L. REV. 634 (1984) (discussing difficulties that arise when court attempts to apply the well-pleaded complaint rule in preemption cases).

155. *Lingle,* 823 F.2d at 1040 (citing *Caterpillar,* 107 S. Ct. at 2428).

156. Under federal labor preemption law, the artful-pleading exception is usually referred to as the complete preemption doctrine. *Caterpillar,* 107 S. Ct. at 2426. The complete preemption doctrine applies when the preemptive force of a statute is so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542, 1547 (1987).

157. *Lingle,* 823 F.2d at 1040 (citing *Lueck,* 471 U.S. at 213-14).

158. *Id.* at 1040.

159. *Id.* at 1041.

breach-of-contract claims.[160] The court further reasoned that the workers' compensation discharge claims had been artfully pled because they actually sounded in contract and would have to be resolved in accordance with the labor contract.[161] The court concluded that, because the claims fit within the artful pleading rule, they actually arose under federal law and were therefore removable under section 1441(b).[162]

The *Lingle* court next addressed whether section 301 preempted the workers' compensation discharge claims. The court noted that it had to determine preemption under the *Lueck* test[163] as reaffirmed in *International Bhd. of Elec. Workers v. Hechler*.[164] The court cited four recent Seventh Circuit decisions that had discussed or resulted in preemption under section 301[165] and one Seventh Circuit decision that resulted in preemption of a retaliatory discharge claim under the Railway Labor Act ("RLA").[166] Of the section 301 cases, two faced the preemption issue squarely, while the other two decided that the facts presented could only give rise to federal claims under section 301 because the state tort claims alleged had not yet been recognized by the relevant states.[167] The two cases that had faced the preemption issue preempted state claims alleging tortious breaches of labor contracts as op-

160. *Id.* The *Lingle* court relied on three cases. *See* Mitchell v. Pepsi-Cola Bottlers, Inc., 772 F.2d 342 (7th Cir.) (tortious termination of employment is actually breach of contract claim), *cert. denied*, 106 S. Ct. 1266 (1986); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985) (Indiana's workers' compensation discharge tort is actually allegation of breach of collective bargaining agreement); Oglesby v. RCA Corp., 752 F.2d 272 (7th Cir. 1985) (Indiana retaliatory discharge claim for refusal to violate federal OSHA regulations is actually wrongful discharge claim under labor contract).

161. *Lingle*, 823 F.2d at 1041.

162. *Id.*

163. *Id. See supra* notes 75-90 and accompanying text.

164. *Lingle*, 823 F.2d at 1043-44 (citing *Hechler*, 107 S. Ct. at 2168).

165. *See* Gibson v. AT & T Technologies, Inc., 782 F.2d 686 (7th Cir.) (claim based on fraud perpetrated by labor contract itself preempted by § 301), *cert. denied*, 106 S. Ct. 3275 (1986); *Mitchell*, 772 F.2d 342 (involuntary discharge in violation of collective bargaining agreement preempted by § 301); *Vantine*, 762 F.2d at 517 (Indiana's workers' compensation discharge claim would be preempted by § 301 if extended to union employees); *Oglesby*, 752 F.2d 272 (Indiana tort of wrongful discharge for following OSHA standards preempted by § 301).

166. Graf v. Elgin, Joliet & Eastern Ry. Co., 790 F.2d 1341 (7th Cir. 1986) (claim alleging retaliatory discharge for filing Federal Employers' Liability Act suit preempted by Railway Labor Act, 45 U.S.C. §§ 151-177 (1982)).

167. The issue before the *Vantine* court was whether Indiana would extend its workers' compensation discharge tort to union employees. *Vantine*, 762 F.2d at 517. The *Oglesby* court preempted a claim of wrongful discharge where the plaintiff had refused to perform a task that he asserted was in violation of federal occupational health and safety law. *Oglesby*, 752 F.2d. at 278. The court found it crucial that Indiana had not recognized such a tort claim, *id.* at 276 n.1, and that, even if it had, such a claim would not be rooted in state public policy because the right being asserted was a federal one. *Id.* at 276 n.3. *Oglesby*, moreover, was decided before the Supreme Court enunciated the *Lueck* test.

posed to tort actions based on non-contractual duties.[168] The RLA case, on the other hand, preempted an employee's state claim alleging discharge in retaliation for filing a Federal Employers' Liability Act suit. The case, however, did not rely on section 301 preemption doctrine and, in fact, distinguished it.[169] The *Lingle* majority concluded that these prior decisions mandated preemption because workers' compensation discharge claims were no less dependent on the labor contract simply because they involved the workers' compensation statute.[170]

Rather than simply rely on and follow these cases, the *Lingle* court undertook to apply the *Lueck* preemption test to the facts presented. The court held that the workers' compensation discharge claims were inextricably intertwined with the labor contract because the labor contract's "just cause" provision was broad enough in scope to prohibit firing an employee for filing a workers' compensation claim.[171] Although the court took note of the plaintiffs' characterization of the claims as independent of the collective bargaining agreement,[172] it disagreed with the means by which the plaintiffs arrived at the conclusion.[173] The court stated that to analyze the nature of the state claim before determining the scope of the pertinent contract provision would allow states to circumvent federal labor policies.[174]

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168. *Gibson,* 782 F.2d at 686 and *Mitchell,* 772 F.2d at 342, both resulted in preemption under the *Lueck* test. In *Gibson,* the court preempted an employee's fraud claim based on information that was withheld by the employer during bargaining. *Gibson,* 782 F.2d at 689. The employee claimed that the fraud caused him to lose benefits provided in the collective bargaining agreement. *Id.* at 687. The court, however, held that the claim was preempted under *Lueck* because the benefit being claimed would not have existed without the contractual provision. *Id.* at 688. In *Mitchell,* the court preempted an employee's claim that he had tortiously been forced to resign. *Mitchell,* 772 F.2d at 346-47. The court characterized his claim as one for wrongful discharge and found that absent the labor contract's "just cause" provision he would have had no right to not be discharged without cause. Accordingly, the court concluded that the state claim was substantially dependent upon the labor contract and preempted under *Lueck. Id.* Both cases, therefore, involved state claims that could not have existed in the absence of the labor contracts.

169. *Graf,* 790 F.2d at 1348. The *Graf* court found inapplicable a Ninth Circuit decision involving section 301 preemption. *Id.* The court, moreover, relied primarily on its previous decision in Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1052 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007 (1984), which found the RLA provided a stronger case for preemption than the other labor statutes. *Graf,* 790 F.2d at 1348.

170. *Lingle,* 823 F.2d at 1046.

171. *Id.*

172. *Id.* The plaintiff-appellants had argued that the worker's compensation discharge claim was not preempted because there was no need to analyze the contract in order to resolve the claim. *Id. Accord* Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 106 (2nd Cir. 1987). *See also* Note, *supra* note 19, at 816 (1985) (workers' compensation discharge claim should not be preempted, in part, because it can be resolved without reference to "just cause" provision of labor contract).

173. *Lingle,* 823 F.2d at 1046.

174. *Id.* In particular, the *Lingle* court concluded that plaintiff-appellants' proposal to analyze the state claim first under the *Lueck* test would circumvent the arbitration and grievance procedures envisioned by Congress as exclusive remedies for employees protected by labor contracts. *Id.*

The *Lingle* court compared its conclusion with that of other federal courts of appeals on the preemption issue. The *Lingle* court noted that the Tenth, Third, and Second Circuits had decided that section 301 did not preempt the workers' compensation discharge tort,[175] but the court chose not to follow what it regarded as faulty reasoning by those circuits. The court also addressed various section 301 preemption decisions from the Ninth Circuit Court of Appeals[176] and concluded that its decision "would not conflict" with the Ninth Circuit's approach.[177] Finally, the *Lingle* court relied on the fact that the Eighth Circuit had come to the same conclusion in an analogous case.[178]

The *Lingle* court then went beyond the facts of the case before it and held that section 301 would preempt all retaliatory discharge claims because a "just cause" provision would always prohibit the conduct prohibited by the state-law claim.[179] The court concluded that the plaintiffs' claims must be dismissed because they could not continue as section 301 claims either.[180]

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175. Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2d Cir. 1987), *see supra* notes 116-126 and accompanying text; Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3rd Cir. 1986), *see supra* notes 107-111 and accompanying text; Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981). It should be noted, however, that *Peabody* was not a section 301 preemption case, but rather, a case involving preemption of a workers' compensation discharge claim under NLRA doctrines. *Peabody,* 666 F.2d at 1313. *See supra* notes 48-59 and accompanying text. Subsequent to *Lingle,* the Tenth Circuit adopted an approach similar to *Baldracchi. See* Local No. 57 v. Bechtel Power Co., 834 F.2d 884 (10th Cir. 1987).

176. The *Lingle* court noted that, while a pre-*Lueck* Ninth Circuit case held that section 301 did not preempt a retaliatory discharge claim where it protected state public policy, Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1376 (9th Cir. 1984), *cert. denied,* 471 U.S. 1099 (1985), the Ninth Circuit's post-*Lueck* opinions seemed to indicate a broader sphere of section 301 preemption. *Id. See* Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984) (preempting claim alleging retaliatory discharge for filing federal OSHA violations). *See also* De Soto v. Yellow Freight Systems, Inc., 811 F.2d 1333 (9th Cir. 1987) (preempting alleged retaliatory discharge for mistakenly acting on belief that employer was in violation of state OSHA regulations).

177. *Lingle,* 823 F.2d at 1049-50. The *Lingle* court, however, misinterpreted the Ninth Circuit's trend. After *Lingle* was decided, the Ninth Circuit Court of Appeals held that section 301 did not preempt a retaliatory discharge claim for refusing to work in violation of California's state OSHA regulations. Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987) In *Paige,* the court reaffirmed the Ninth Circuit's section 301 preemption exception for retaliatory discharge claims which violated state public policy and cited *Garibaldi* with approval. *Id.* at 863. The Ninth Circuit, moreover, views the workers' compensation discharge tort as a violation of public policy. *Garibaldi,* 726 F.2d at 1371 n.6 (dicta).

The *Paige* court distinguished both *Olguin* and *De Soto,* the keys to the *Lingle* court's trend analysis. *Id.* at 863. *See supra* note 176. *See also* Tellez v. Pacific Gas and Elec. Co., 817 F.2d 536 (9th Cir.) (state tort claims of defamation, and negligent and intentional infliction of mental distress, not preempted by § 301), *cert. denied,* 108 S. Ct. 251 (1987).

178. Johnson v. Hussman Corp., 805 F.2d 795 (8th Cir. 1986). *See also supra* notes 113-16 and accompanying text.

179. *Lingle,* 823 F.2d at 1049.

180. *Id.* at 1050. In order to bring a § 301 claim, an employee must first exhaust all available

C. The Dissenting Opinion

Judge Ripple, in a dissent joined by Judge Cudahy, began by pointing out that questions of federalism should always be approached carefully.[181] He agreed with the majority that *Lueck* required preemption of a state claim when its resolution is inextricably intertwined with the terms of a labor contract.[182] Equally important to the dissent, however, was *Lueck's* limiting language stating that, in extending section 301's preemptive effect beyond state breach-of-contract claims, it would be inconsistent with congressional intent to preempt state rules that proscribe conduct or establish rights and obligations independent of a labor contract.[183]

The dissent criticized the majority's application of the *Lueck* test as both one-sided and unfocused.[184] The dissent first distinguished the state law in *Lueck* from the state law in *Lingle.* Judge Ripple stressed that, in *Lueck,* the duty of the employer to provide insurance in good faith derived solely from the collective bargaining agreement while, in *Lingle,* the right to workers' compensation is guaranteed by Illinois statute to all workers.[185] To illustrate that the workers' compensation discharge claim's resolution was independent of the contract, Judge Ripple pointed out that the employer need only prove that the employee was not fired for filing a workers' compensation claim in order to defend the lawsuit.[186] The dissent agreed with the plaintiffs that there would be no need for the employer to prove that the employee had been fired for just cause as defined by the labor contract.[187]

The dissent also addressed what it viewed as the many theoretical and practical difficulties created by the majority's decision. Judge Ripple questioned whether any limits were left on section 301's preemptive effect after *Lingle.*[188] He also pointed to the practical difficulties that *Lingle* would create in Illinois because the Illinois Supreme Court had reached the opposite

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contractual remedies. Republic Steel Corp. v. Maddox, 379 U.S. 650, 662 (1965). There are four exceptions to the exhaustion of remedies rule: (1) where the conduct of the employer amounts to a repudiation of the contractual procedures; (2) where the grievance procedures would be futile; (3) where the union has been relieved of the obligation to represent the employee, *see* D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1488 (7th Cir. 1985); or (4) where the union has breached its duty of fair representation, *see* Vaca v. Sipes, 386 U.S. 171, 186-88 (1967). *See generally* Smith, *supra* note 2, at 52-53 (discussing the four exceptions to the exhaustion of remedies requirement and articulating possible fifth exception, derived from lower court decisions, for state tort actions protecting public policy).

181. *Lingle,* 823 F.2d at 1051 (Ripple, J., dissenting).

182. *Id.*

183. *Id.* at 1052.

184. *Id.* at 1053.

185. *Id.*

186. *Id.*

187. *Id.* at 1054 (citing Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 105 (2d Cir. 1987)).

188. *Id.*

result.[189] Moreover, he criticized the majority for creating a major legal conflict within Illinois with no direct Supreme Court precedent to support its conclusion.[190] Finally, he pointed out that, in fact, the majority had ignored a Supreme Court precedent that conflicted with its conclusion.[191]

III. ANALYSIS

A. *The Validity Of The Removal Analysis*

A brief summary of the *Lingle* court's removal analysis is necessary in order to understand how the court erred. The court held that a federal court presented with a section 301 defense must first determine that it has subject matter jurisdiction through proper removal before it can address the merits of the preemption claim.[192] The court correctly noted that a strict application of the well-pleaded complaint rule would deprive lower federal courts of the opportunity to ever address this important federal issue.[193] The court reasoned, however, that a federal court should apply the artful pleading doctrine[194] in order to allow removal in certain preemption cases.[195] The court held that application of the federal court test for an artfully pled federal question in section 301 preemption cases is necessary to determine whether a state claim is sufficiently independent of the labor contract so as to avoid removal.[196] The court concluded that it could proceed with its preemption review only because the state claim was dependent upon the labor contract and, therefore, properly removable.[197]

The *Lingle* court cited two authorities in support of its removal analysis: the Supreme Court's decision *Caterpillar Inc. v. Williams,*[198] and a law review article on federal jurisdiction in preemption removal cases by Mary

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189. *Id.* at 1055.

190. *Id.*

191. *Id. See* Pan Am World Airways, Inc. v. Puchert, 472 U.S. 1001 (1985) (Railway Labor Act did not preempt workers' compensation discharge claim), *dismissing appeal from* Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984). *See also infra* notes 263-273 and accompanying text.

192. Under 28 U.S.C. § 1441(b), removal is proper only when the complaint itself raises a federal question—a federal defense ordinarily is insufficient. *See supra* notes 152-54 and accompanying text.

193. *Lingle,* 823 F.2d at 1043.

194. Under federal labor preemption terminology, the "artful" pleading exception is known as the complete preemption doctrine. *See supra* note 156. The significance of the *Lingle* court's technical misstatement is apparent because the result brought about by a determination that a state tort claim is an artfully pled section 301 claim is that the state claim itself is, in fact, preempted. The use of the proper term would have made this point clearer and perhaps avoided the confusion altogether. *See infra* notes 198-216 and accompanying text.

195. *See infra* note 196.

196. *Lingle,* 823 F.2d at 1040 (citing *Lueck,* 471 U.S. at 213-14).

197. *Id.* at 1041.

198. 107 S. Ct. 2425 (1987).

P. Twitchell.[199] In *Caterpillar,* employees sued in state court alleging that their employer breached individual employment contracts with them.[200] The company removed the case to federal court and argued preemption.[201] The Supreme Court noted that, while the well-pleaded complaint rule would normally prevent removal of a section 301 case,[202] the complete preemption doctrine[203] would allow removal when the core of a state law complaint is actually a clause in a collective bargaining agreement.[204] The *Caterpillar* court used the *Lueck* test to determine whether the state claim was substantially dependent upon the labor contract and, therefore, removable.[205] In other words, a state law claim will only raise a federal question and be removable if it is clearly preempted under *Lueck*.[206] Preemption, under *Caterpillar,* must be considered first in order to determine if the complete preemption doctrine applies and the case is removable.

Despite the *Lingle* court's reliance on *Caterpillar* as support for its removal analysis, the cases are in direct conflict on that issue. While *Caterpillar* applied the complete preemption doctrine and held that a state court action is only removable if it is clearly preempted,[207] *Lingle* held that a federal court cannot reach the merits of the preemption issue unless the case is removable.[208] The *Lingle* court further confused the matter by using the preemption test itself to determine removability.[209] The *Lingle* analysis is wrong because once a case is held removable, it is already preempted as a matter of law.[210] To continue with a substantive preemption analysis is pointless because there is no need to decide the preemption issue twice.

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199. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts,* 54 GEO. WASH. L. REV. 812 (1986).

200. *Caterpillar,* 107 S. Ct. at 2427-28.

201. *Id.*

202. *Id.* at 2429 (citing Gully v. First National Bank, 299 U.S. 109, 112-13 (1936)) (plaintiff is ordinarily the master of his complaint and can characterize plea any way he wishes). For more background, see *supra* note 158.

203. *Caterpillar,* 107 S. Ct. at 2430.

204. *Id.* (citing Avco Corp. v. Machinists, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd,* 390 U.S. 557 (1968)).

205. *Caterpillar,* 107 S. Ct. 2431.

206. *See id.* The *Caterpillar* court stated a state tort complaint is removable when "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action . . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *Id.* at 2430 (citing Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 23 (1983)).

207. *Caterpillar,* 107 S. Ct. 2431.

208. *Lingle,* 823 F.2d at 1038.

209. *Id.* at 1040. Although *Caterpillar,* 107 S. Ct. at 2431-32, held that the *Lueck* preemption test determines removability and is thus somewhat in accord with *Lingle,* the use of such a test is completely inconsistent with the view that removability and preemption are always discrete issues. The *Lingle* court, however, held that a federal court must first determine removability before proceeding to preemption and must always distinguish between the two, yet also held that the test for removability is the very same as that for preemption.

210. *See Caterpillar,* 107 S. Ct. at 2430.

The *Lingle* court also relied on a recent article on federal jurisdiction in preemption removal cases by Mary P. Twitchell. In her article, Twitchell argues that the complete preemption doctrine may upset federalism concerns by reaching the preemption issue in cases that could be summarily remanded to state court before the issue was reached.[211] Twitchell proposes a three-part test that gives a federal court two preliminary opportunities to remand a section 301 preemption case before applying the complete preemption doctrine as the third prong of the test.[212] Twitchell admits, however, that the third prong of her test for removability is, and must be, a substantive application of the *Lueck* preemption test.[213] Under Twitchell's test, a state law claim is ultimately only removable to federal court if it is preempted—the test simply gives a federal court two preliminary chances to remand before reaching the preemption issue.[214] The Twitchell article provides no support for the *Lingle* court's removal analysis because the court applied only the third prong of her test—substantive preemption review—and, by doing so, decided the substantive preemption issue. Therefore, when the court proceeded to what it viewed as preemption review, it was deciding the matter for the second time. Twitchell's article provides no support for this manner of preemption analysis.

Contrary to its claim, therefore, the *Lingle* court had no support for electing to decide the preemption issue twice and criticizing the federal district court for not following its redundant application of removal doctrine.[215] Moreover, the court's confused removal analysis unnecessarily complicated an already muddled set of section 301 precedents.[216] In sum, the court's removal analysis was, at best, unnecessary, but may also have been symptomatic of a fundamental misunderstanding of section 301 preemption doctrine.

B. Lingle's *Preemption Analysis: The Wrong Conclusion by Expanding the* Lueck *Approach*

The *Lingle* court significantly altered the section 301 preemption test and came to the wrong conclusion through its unbalanced reading of section 301

211. Twitchell, *supra* note 199, at 861-62.

212. *Id.* at 865-69. Twitchell argues that a reviewing federal court must determine whether Congress has given the plaintiff alleging the state claim an express cause of action under the federal regulatory scheme. If not, the suit must be remanded. If the plaintiff has a federal cause of action that could have been brought instead, the federal court must then determine whether the defendant could reasonably argue that Congress intended that the regulatory scheme preempt the state law claim. If not, the claim must be remanded. If the state claim is not remanded under either of the first two prongs of the test, the federal court must then proceed with full substantive review under the complete-preemption doctrine. If the state claim is completely preempted, it is not only removed to federal court but preempted as well. If not, the claim must be remanded under the well-pleaded complaint rule. *Id.*

213. *Id.* at 866-67.

214. *Id.*

215. *Lingle,* 823 F.2d at 1037 (criticizing district court in *Lingle* and *Martin* for addressing preemption before removability).

216. *See* Twitchell, *supra* note 199, at 812-16 (describing general confusion in preemption caselaw with specific references to § 301 cases).

preemption precedents and policies. Contrary to the court's statement, it was not bound by any of its own precedents involving section 301 preemption. Of the four cases cited, only two squarely faced the preemption issue, and both presented clear cases for preemption under *Lueck* because the duties that were alleged to have been breached in those cases existed only because of a collective bargaining agreement.[217]

Lingle, however, involved a claim that existed with or without a labor contract and for breach of a state, not a contractual, duty.[218] Thus, it was not within the rules set out in prior Seventh Circuit decisions. Furthermore, *Graf v. Elgin, Joliet & Eastern R.R.,* a Railway Labor Act preemption case, should not have been controlling or even relevant because the rule had always been that the RLA's language and structure required broader preemption principles than did the NLRA/LMRA.[219] Even accepting the applicability of the RLA preemption doctrine, *Graf* can not only be distinguished on other pertinent grounds, its use by the court raises another analytical problem discussed below.[220]

With no controlling precedent to consider, the *Lingle* court's decision must rest on its reading of *Lueck,* federal policy and the prior decisions of the other circuits that had decided the same issue. The *Lingle* court relied on the interest in a uniform set of labor laws, and the desire to encourage arbitration rather than litigation to resolve labor disputes to find that section 301 preempted the workers' compensation discharge tort.[221] The *Lingle* court, however, applied the *Lueck* test solely to further these two federal policies, and ignored the fact that *Lueck* itself represents the Supreme Court's ultimate determination of how those policies are to be applied in section 301 preemption cases.[222] *Lingle* also parted ways with the majority of federal circuits that had applied *Lueck* to the workers' compensation issue without offering an adequate justification for doing so.[223]

In *Lueck,* the Supreme Court certainly did point out the federal interests in uniformity and arbitration as major forces requiring preemption of certain state tort claims under section 301.[224] *Lueck,* however, also pointed out a

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217. *See supra* notes 167-68.

218. *See supra* notes 91-100.

219. *See, e.g.,* Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1052 (7th Cir. 1983), *cert denied,* 465 U.S. 1007 (1984); Koehler v. Illinois Central Gulf R.R. Co., 109 Ill. 2d 473, 488 N.E.2d 542, 544-45 (1985), *cert denied,* 106 S. Ct. 3297 (1986). *See supra* note 169.

220. *See infra* notes 263-273 and accompanying text.

221. *Lueck,* 471 U.S. at 211 (1985) (citing Teamsters v. Lucas Flour, 369 U.S. 95, 103-04 (1962)).

222. The entire purpose of a legal test is to limit lower courts in their applications of all the competing interests in a given area of law. The goal of the high court in the jurisdictional structure is to synthesize the policy interest into an applicable rule so that some uniformity among the lower courts can be achieved. *See* Quinlan, *The Illinois Appellate Court: An Intermediate Appellate Court—Does It Have a Future?* ABA, Appellate Judges Newsletter (Winter 1986-87).

223. *See infra* notes 238-46, 254-55 and accompanying text.

224. *Lueck,* 471 U.S. at 211-12.

countervailing interest, i.e., a great reluctance to preempt state tort actions unless absolutely necessary.[225] In particular, the Supreme Court explained that "it would be inconsistent with congressional intent [in section 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."[226] Moreover, the *Lueck* Court emphasized that it had only minimally expanded section 301's preemptive scope and that section 301 should only preempt a state-law claim when it is substantially *dependent* upon analysis of the contract's terms.[227]

The key word of the *Lueck* test is "dependent" and the *Lueck* Court's application of its own test illustrates that fact. The Court stressed that, but for the labor contract's creation of a duty on the part of the employer to provide insurance to its employees, the employee in *Lueck* would have had no claim at all.[228] Thus, the tortious bad-faith breach-of-contract claim at issue in *Lueck* was preempted because it was substantially *dependent* upon analysis of the labor contract within the meaning of the test.[229] The Court never stated, as did the *Lingle* court, that the terms of the labor contract would determine section 301's preemptive scope. Instead, the Court viewed the nature of the state claim as the crucial factor.[230]

Another case illustrative of the Supreme Court's application of the *Lueck* "substantially dependent" test is *International Bhd. of Elec. Workers v. Hechler*.[231] In *Hechler,* the court reaffirmed the *Lueck* test and applied it to a state tort claim alleging the breach of a union's duty to provide a safe workplace.[232] The *Hechler* court preempted the state claim following a but-for analysis similar to the *Lueck* test.[233] The court reasoned that, under Florida common law, only employers owed a duty to provide their employees with a safe workplace, not unions.[234] As in *Lueck,* therefore, the employee in *Hechler* would not have had a claim "but-for" the labor contract's provision that the union had a duty to provide the employee with a safe workplace.[235] The *Hechler* court concluded that section 301 preempted the state-law claim because its existence substantially depended upon the union's duty under the contract.[236] In both *Lueck* and *Hechler,* therefore, the Su-

225. *Id.* at 220-21. *See supra* notes 84-87 and accompanying text.

226. *Lueck,* 471 U.S. at 212.

227. *Id.* at 220-21.

228. *Id.* at 218.

229. If the *Lueck* Court had not preempted the claim, it would have impinged on the federal policy favoring contractual agreements and remedies because employers would hesitate to assume any new contractual obligations if any breach of them could give rise to tort claims with general and punitive damages. *See Lueck,* 471 U.S. at 211.

230. *See id.* at 213-14.

231. 107 S. Ct. 2161 (1987).

232. *Id.* at 2166-67.

233. *Id.* at 2168.

234. *Id.* at 2167.

235. *Id.* at 2167-68.

236. *Id.*

preme Court applied the substantially-dependent test by examining the state-law claim to determine whether it merely derived from the contract or had an independent source.[237]

The Illinois Supreme Court and most federal circuit courts of appeals followed the United States Supreme Court's application of the *Lueck* test in determining whether section 301 preempted the workers' compensation discharge tort.[238] These courts asked whether the employee could have brought a workers' compensation claim in the absence of a contractual provision that employees could only be fired for just cause.[239] These courts concluded that all employees are entitled to file workers' compensation claims regardless of the existence of a labor contract and, therefore, *Lueck's* but-for analysis did not result in preemption.[240]

The Illinois Supreme Court and the Third Circuit Court of Appeals, however, went one step further in testing for section 301's preemption of workers' compensation discharge claims and inquired whether the labor contracts would have to be referred to by either party in resolving the claims.[241] These courts concluded that neither employer nor employee would need to refer to the "just cause" provision or that provision's interpretation in order to resolve the workers' compensation discharge claims at issue because all the elements of the tort claim were provided by state law.[242] Accordingly, the courts held that the workers' compensation discharge claims were not substantially dependent upon analysis of the labor contracts.[243]

The *Lingle* court, however, applied the *Lueck* substantially-dependent test differently. The *Lingle* court merely acknowledged the language in *Lueck* that limited the application of the test,[244] but did not attempt to apply those limits to the workers' compensation discharge claim.[245] The *Lingle* court instead focused on only two of the policies that affect section 301 preemption—achieving uniformity in labor laws, and encouraging employees to arbitrate rather than litigate labor disputes—in what became its substantial expansion of *Lueck's* preemptive scope.[246]

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237. *See Lueck,* 471 U.S. at 214-16; *Hechler,* 107 S. Ct. at 2167-68.

238. Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2d Cir. 1987); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120 (3d Cir. 1986); Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986), *cert denied,* 107 S. Ct. 3248 (1987). *See also* Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987) (decided after *Lingle* but using the "but-for" approach in a similar situation).

239. *See Baldracchi,* 814 F.2d at 105; *Herring,* 799 F.2d at 124 n.2; *Gonzalez,* 115 Ill. 2d at 10-12, 503 N.E.2d at 312-13.

240. *Id.*

241. *Baldracchi,* 814 F.2d at 106; *Gonzalez,* 115 Ill. 2d at 12-14, 503 N.E.2d at 314-15.

242. *Id.*

243. *Id.*

244. *Lingle,* 823 F.2d at 1046.

245. *Id.* at 1053 (Ripple, J., dissenting).

246. *See generally* Kinyon and Rohlik, *supra* note 8, at 23-37 (discussing other policies including (1) sufficiency of the administrative remedy; (2) state interest in the tort; (3) whether

The *Lingle* court read the *Lueck* test to require an examination of whether the workers' compensation discharge tort was inextricably intertwined with the "just cause" provision of the labor contract.[247] The *Lingle* court did not, however, apply the but-for approach of either *Lueck* or *Hechler*. If the court had done so, it could not have avoided the conclusion that the claim did not depend on the labor contract for its existence.[248] Instead, the court first examined the scope of the just cause provision and determined that it prohibited the employer from firing employees simply for filing workers' compensation claims.[249] The *Lingle* court concluded that the workers' compensation discharge claim was inextricably intertwined with the "just cause" provision because the state claim prohibited the same activity prohibited by the contract clause.[250]

The *Lingle* court's application of the *Lueck* test is too expansive because it broadens the scope of section 301's preemptive effect far beyond that envisioned by *Lueck*. Under the *Lingle* approach to section 301 preemption, whenever a labor contract prohibited certain tortious conduct, any state tort that prohibited the same conduct would be preempted, regardless of the nature of the state claim, the conduct at issue or any difference in remedies.[251] *Lueck* stated, however, that section 301 should not preempt every state-law suit asserting a right that relates in some way to a provision in a labor contract.[252] The limits placed on section 301 preemption by *Lueck* are meaningless and unenforceable if the *Lingle* approach is used.[253] Moreover, the *Lingle* court did not adequately address its sister circuits' rationales nor that of the Illinois Supreme Court in its disagreement with their results.[254] The court never explained why it disagreed with these courts except to say

the law is of general applicability or aimed solely at the union employment relationship; and (4) a desire not to penalize workers for collectively bargaining). These other policies or factors in determining preemption or fashioning an equitable preemption test were not even addressed by the *Lingle* court.

247. *Lingle,* 823 F.2d at 1042.

248. The fact that Illinois' workers' compensation discharge claim is available to at-will employees is conclusive that, but for the contract in any given situation, the claim would nevertheless be available to the employee who was discharged for filing a valid workers' compensation claim. *See Gonzalez,* 115 Ill. 2d at 9-14, 503 N.E.2d at 312-14.

249. *Lingle,* 823 F.2d at 1046.

250. *Id. See also* Green v. Hughes Aircraft Co., 630 F. Supp. 423, 426-27 (S.D. Cal. 1985) (preempting defamation claim because defamatory statements were central to rights and procedures provided under collective bargaining agreement).

251. For example, if the *Lingle* rationale is followed to its logical conclusion, a labor contract clause that forbade the battering of employees and provided limited remedies under a grievance procedure for breaches of the clause would preempt an employee's state common law battery claim simply because the contract addressed the matter.

252. *Lueck,* 471 U.S. at 211-12.

253. *See, e.g., supra* note 251. *See also Lingle,* 823 F.2d at 1053-54 (Ripple, J., dissenting) (pointing out that there are no limits on majority's analysis).

254. The *Lingle* court, for example, never attempted to reconcile its application of the *Lueck* test with the *Lueck* opinion. Nor did the *Lingle* court attempt to show a disparity between the *Baldracchi* court's application of the *Lueck* test and *Lueck* itself.

they were wrong,[255] nor did the court explain *how* the other courts' approach to the *Lueck* test damaged the federal policies that *Lingle* relied upon. Any in-depth analysis of its approach would have forced the *Lingle* court to accept the fact that it was significantly altering the *Lueck* test.

The only justification articulated by the *Lingle* court for its broadened application of the *Lueck* test was that federal labor policies required such an approach.[256] The *Lingle* court stated that the federal interest in uniform labor laws and arbitration mandated its broadened view of section 301 preemption.[257] The *Lingle* court ignored, however, that its approach to section 301 preemption was inconsistent with federal labor policy articulated by the Supreme Court in *Metropolitan Life Ins. Co. v. Massachusetts.*[258]

In *Metropolitan,* the Court determined that the balance-of-power doctrine[259] did not preempt a state statute which mandated minimum health care benefits to be included in all general insurance policies that were part of employee benefit packages.[260] Various insurance companies had argued that the statute should be preempted because it upset the balance of power between labor and management under the NLRA.[261] The *Metropolitan* Court responded that "[i]t would turn the policy that animated the [federal labor law] on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers."[262] Though not a section 301 preemption case, *Metropolitan* stressed that fairness toward employees must always be weighed against the desire for uniformity and the preference for arbitration in labor matters. The *Lingle* court ignored this equally important concern in its analysis.

Finally, the *Lingle* court unjustifiably relied on its previous decision in *Graf v. Elgin, Joliet & Eastern Railway Co.*[263] to support its preemption analysis. In *Graf,* the court held that the Railway Labor Act (RLA)[264] preempted an Illinois retaliatory discharge claim, but not in the workers' compensation context. The *Lingle* court found *Graf* applicable to its section 301 analysis because the Seventh Circuit, in dicta from an earlier case,[265] stated that the preemption standards for the RLA and the LMRA arguably

255. *See Lingle,* 823 F.2d at 1047-49.
256. *Id.* at 1047.
257. *Id.*
258. 471 U.S. 724 (1985).
259. *See supra* notes 42-45 and accompanying text.
260. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985).
261. *Id.*
262. *Id.* at 756.
263. 790 F.2d 1341 (7th Cir. 1986).
264. 45 U.S.C. §§ 151-77 (1982).
265. Lancaster v. Norfolk & Western Ry. Co., 773 F.2d 807, 816-17 (7th Cir. 1985), *cert denied,* 107 S. Ct. 1602 (1987).

should be the same.[266] The *Lingle* court relied on this dicta in spite of the fact that the general rule had been that the RLA's structural complexity required a stricter preemption test than under either the NLRA or the LMRA.[267]

In finding RLA preemption doctrine applicable to section 301 preemption the *Lingle* court should have discussed *Puchert v. Agsalud*[268] and *Pan Am. World Airways, Inc. v. Puchert.*[269] In *Puchert,* the Hawaii Supreme Court held that the RLA did not preempt that state's tort of retaliatory discharge for filing a workers' compensation claim.[270] The employer in *Puchert* then appealed to the United States Supreme Court. The Supreme Court, however, dismissed the appeal as not representing a substantial federal question.[271]

Since the *Lingle* court considered RLA preemption cases equally dispositive of the section 301 preemption issue, the court should have at least mentioned *Pan Am,* a United States Supreme Court precedent in an analogous setting that completely disagreed with its result. It is true that the *Puchert* opinion was from another jurisdiction, but the approval given that opinion by the United States Supreme Court in the appeal had precedential value in the Seventh Circuit. The *Lingle* court, however, relied on the broad RLA preemption language and holding of *Graf* to support its own broad application of the *Lueck* test, and neglected to address the negative precedential implications raised by its analysis.[272] Moreover, the language in *Graf,* requiring preemption wherever federal labor policy might be affected, is in direct conflict with *Lueck.*[273]

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266. In *Lancaster,* 773 F.2d at 816-17, the court reasoned that the preemption doctrines under both section 301 and the RLA should be the same because both statues create an exclusive federal remedy. *Contra* Koehler v. Illinois Gulf Central R.R. Co., 109 Ill. 2d 473, 488 N.E.2d 542, 544-45 (1985) (complexity of RLA's administrative scheme requires stricter preemption standards than under either the LMRA or the NLRA), *cert. denied,* 478 U.S. 1005 (1986).

267. *See supra* note 264.

268. 67 Haw. 25, 677 P.2d 449 (1984), *appeal dismissed sub. nom.* Pan Am. World Airways, Inc. v. Puchert, 472 U.S. 1001 (1985).

269. 472 U.S. 1001 (1985).

270. *Puchert,* 67 Haw. at 29, 677 P.2d at 453.

271. *Pan Am. World Airways, Inc.,* 472 U.S. at 1001.

272. *See Lingle,* 823 F.2d at 1054 (Ripple, J., dissenting).

273. In Graf v. Elgin, Joliet & Eastern Ry. Co., 790 F.2d 1341, 1346 (7th Cir. 1986), the court stated that "there is overwhelming support in the case law for complete preemption in collective bargaining cases. . . . Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, the cases hold that the remedy is exclusive; the worker has no state remedies." It is not logically possible, however, to harmonize the *Graf* quotation above with a pertinent quotation from *Lueck* on section 301 preemption. In *Lueck,* the Court stated that, "[o]f course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law." *Lueck,* 471 U.S. at 211. *See also* La Buhn v. Bulkmatic Transport Co., 644 F. Supp. 942, 950-51 (N.D. Ill. 1986) (criticizing *Graf* approach to preemption, especially as applied to § 301).

IV. IMPACT

Lingle will have a significant impact upon both Illinois and federal law. In *Lingle,* the Seventh Circuit has in effect overruled an Illinois Supreme Court precedent without any actual Congressional authority to do so.[274] This is so because, under *Lingle,* employers can easily avoid the Illinois precedent of *Gonzalez* through expedient removal.[275] Once removed, *Lingle* explicitly holds that *any* retaliatory discharge claim must be preempted where the labor contract contains a just cause provision.[276] Further, given *Lingle's* framing of the *Lueck* test, an employer need only show that a clause in the applicable contract already regulates the conduct giving rise to the employee's state tort claim in order for section 301 to preempt that claim.[277] Indeed, the *Lingle* court placed no limit on the individual tort claims that would be preempted by the existence of a previous agreement on the matter between an employer and labor union. This result will not only curtail union employee rights in the state, but also will work to penalize union employees by providing more complete remedies to their non-union counterparts.[278]

Lingle's removal and preemption analysis will have a negative impact on federal labor preemption law as well. The court's confused and muddled reading of removal law and the complete preemption doctrine will complicate Illinois federal district courts' required attempts to follow the case.[279] Under *Lingle,* district courts must first use the *Lueck* test to determine whether the case is removable and only then proceed to preemption. These courts will be required to decide the preemption issue twice: once under the complete preemption doctrine and again under substantive preemption review.[280] This is not only confusing and unnecessary, it is also inconsistent with the Supreme Court's recent removal analysis in *Caterpillar.*[281] The result will be certain confusion within the courts of the Seventh Circuit and possible confusion in other jurisdictions.

Lingle's substantive preemption analysis creates other difficulties. First, the court's framing of the *Lueck* test stands in direct contradiction to language in the *Lueck* opinion. The fact that, under *Lingle,* a contractual remedy can override a state tort remedy regardless of the nature of the tort

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274. Other than in habeas corpus proceedings, only the United States Supreme Court has jurisdiction to review state court decisions. 28 U.S.C. § 1257 (1982).

275. If removed as a matter of course, Illinois state courts will be completely precluded from hearing the cases and *Gonzalez* may as well be overruled.

276. *Lingle,* 823 F.2d at 1051.

277. *See supra* notes 249-51 and accompanying text.

278. Contractual arbitration remedies are usually limited to reinstatement and back pay while tort claims can offer punitive as well as other monetary damages. Moreover, an employee who has truly been discharged for filing a valid workers' compensation claim may not consider reinstatement to be a remedy at all. *See Lingle,* 823 F.2d at 1055 (Ripple, J., dissenting).

279. *See supra* notes 192-216 and accompanying text.

280. *See supra* notes 207-16 and accompanying text.

281. *See supra* notes 198-210 and accompanying text.

claim simply cannot be reconciled with *Lueck's* statement that parties to a labor contract cannot bargain for what is illegal under state law.[282] Second, the *Lingle* test misconceives the analytical basis for section 301 preemption and its use will confuse labor preemption law as a whole. The entire basis for preemption under section 301 lies in the need to interpret breach of labor contract claims under uniform principles of federal contract law.[283] *Lueck* eliminated the ability to simply rephrase a contract claim as a tort and avoid preemption where the contract remains the basis of the claim or is necessary for its resolution.[284] This is doctrinally sound because the inherent basis for the claim remains the contract itself. *Lueck* should not, however, be used to preempt tort actions than can exist *and* be resolved without reference to a labor contract because there is no analytical conflict in such cases between state tort law and section 301 federal common law. Without such a conflict, preemption under section 301 would be without doctrinal support and, therefore, inappropriate regardless of federal policy.[285]

Lingle's expansion of *Lueck*, moreover, is unnecessary in light of another labor law preemption doctrine—the balance-of-power test.[286] The interplay between these two doctrines provides sufficient protection for federal interests. For example, it has been suggested that without the *Lingle* approach, a state legislature would be free to pass a statute which prohibits the wrongful discharge of all employees, defines wrongful discharge comprehensively and provides complete tort remedies and sanctions for statutory violations, thereby taking the matter off the collective bargaining table entirely.[287] Although a strict reading of *Lueck* would not preempt the statute, it arguably should be preempted under the balance-of-power test.[288] The focus of the dispute should not revolve around whether the hypothetical statute is substantially dependent upon analysis of a labor contract because the statute would be completely self-executing. Thus, there could be no conflict with section 301 common law. Instead, preemption in such a case should turn on whether the statute, by removing a major bargaining tool of employers, would substantially alter the balance-of-power between labor and management as established by the federal labor laws.[289] Accordingly, it would be preempted

282. *See supra* notes 244-55 and accompanying text.

283. *Lueck*, 471 U.S. at 210 (citing *Lucas Flour*, 369 U.S. at 103-04).

284. *See supra* notes 224-43 and accompanying text.

285. The issue is not whether the conduct alleged is covered by the contract but, rather, whether the tort claim alleged requires analysis of the labor contract in order to be resolved. Only if the labor contract is necessary to the resolution of the claim is there a potential conflict with the section 301 body of federal contract law. Without this conflict or potential conflict, there is no basis from which to infer the necessary congressional intent to preempt under the supremacy clause. *See supra* note 47.

286. *See supra* notes 42-47 and accompanying text.

287. Memorandum of Respondent on Petition for Certiorari, at 5-6, Lingle v. Norge Div. of Magic Chef, Inc., No. 87-259 [hereinafter, Memorandum].

288. *See supra* notes 42-47 and accompanying text.

289. Such a statute would remove a major employer bargaining chip from the bargaining

under the balance-of-power test absent evidence of specific congressional intent to the contrary.[290] *Lingle's* extension of section 301 preemption would result in unnecessary confusion with the balance-of-power test: the appropriate doctrine to preempt state laws not dependent upon a labor contract but nevertheless injurious to federal labor policy.

More generally, *Lingle* will have a negative impact on federal preemption law because it demonstrates a disregard for the basic aspects of federalism.[291] The court accorded no weight to the Illinois Supreme Court's characterization of its state tort law and relegated discussion of *Gonzalez* to a mere summary in a footnote.[292] Although section 301 preemption is a matter of federal law, the *Lingle* court should not have created such a jurisdictional conflict without a thorough discussion of *Gonzalez.* The conflict, moreover, is particularly acute because *Gonzalez* remains binding precedent in Illinois state courts.[293] Finally, *Lingle* creates a major conflict among the federal circuits and calls for Supreme Court action to evaluate the decision and clear up the confusion over *Lueck.*[294] The *Lueck* test for section 301 preemption, if properly applied, strikes a sound balance between the federal interest in uniform labor laws and use of arbitration, and the countervailing state interest in the protection of employees through the use of its police power. A narrow reading of the *Lueck* test also keeps the scope of section 301 preemption within its logical limits. The *Lueck* Court, however, left significant opportunities for the lower courts to misapply the test. Lower courts have focused on the extremes of the rationales and policies found in the opinion rather than on the words of the test.[295]

The *Lueck* Court, in its conclusion, held that section 301 will preempt a state claim when resolution of the claim is substantially dependent upon analysis of the terms of a labor contract.[296] These words comprise the *Lueck* test and lower courts should concentrate on them as opposed to bits and pieces from the rest of the opinion. A lower court should begin its analysis by determining the nature of the state-law claim and then go on to determine

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table and alter the balance of power between labor and management to a much greater degree than the activity preempted in *Machinists,* 427 U.S. at 135-36. The *Machinists* Court preempted a state labor relations board's attempt to stop employees' concerted refusal to work overtime during contract negotiations. *Id.* The court found that the state action removed an important economic weapon from the union's perspective and altered the balance-of-power to such a degree that a conflict with federal labor law was created. *Id.* at 154-55. In the hypothetical situation, the complete removal of the usual presumption of employment-at-will works a much greater alteration in the parties' bargaining positions than the state board's action in *Machinists.*

290. *See supra* note 246 and accompanying text.

291. *See Lingle,* 823 F.2d at 1053-55 (Ripple, J., dissenting).

292. *Lingle,* 823 F.2d at 1036-37.

293. *Id.* at 1054-55 (Ripple, J., dissenting).

294. *See* Memorandum, *supra* note 287, at 2 ("the conflict on the question presented in now undeniably 'acute'").

295. *See supra* note 11 (extreme examples).

296. *Lueck,* 471 U.S. at 220-21.

whether the claim is *substantially dependent* on the contract.[297] The key words of the analysis, however,—dependent and substantially—are ambiguous and require a judicial gloss in order to guarantee a consistent application in the lower courts.

It is therefore proposed that courts determine whether a state law claim is substantially dependent upon the terms of a labor contract by applying a two-part refinement of the *Lueck* test. Under the refined test, a reviewing court would first inquire whether the employee's state claim would exist but-for the existence of the labor contract and, if it would, go on to inquire whether reference to the labor contract would be necessary in order to resolve the claim. If either of the inquiries results in a positive answer, the claim would be substantially dependent upon the labor contract and preempted by section 301.

The first, but-for, part of the proposed test derives from the word "dependent" in *Lueck*. For purposes of clarity, dependent can more easily be defined as completely dependent, rather than the qualified term "substantially dependent."[298] A state-law claim, in order to be completely dependent on a labor contract, must be unavailable to an employee "but-for" the contract's provisions.[299] This was the situation in both *Lueck*[300] and *Hechler*[301] where it provided an obvious case for section 301 preemption—but for the duties created by the contracts in those cases, the state-law claims could not have been brought. The but-for inquiry would be consistent with *Lucas-Flour* because it would also preempt a parallel breach-of-contract claim under state law.[302] Thus, under the first part of the test, a state claim would be preempted if it could not exist but-for the labor contract. If the claim would nevertheless exist absent the contract, the reviewing court must go one step further in order to satisfy *Lueck*.

The *Lueck* test refinement would require another step for those state claims that pass the but-for analysis because the actual *Lueck* language is "substantially dependent" rather than "completely dependent."[303] Stopping with the but-for step would be too strict and not give section 301 a broad enough preemptive scope.[304] As the second step in the *Lueck* refinement, a

297. This is, in fact, the basic approach that the *Baldracchi* court took. *See supra* note 41.

298. A "but-for" analysis is clear and easy to apply as a first step. It is only logical to preempt clearly dependent state claims before getting into the vagaries of what constitutes "substantial" dependence.

299. A state claim would always be completely dependent on the contract where the claim is based on the breach of a duty provided for in the contract and would not exist otherwise. *See infra* notes 300-01.

300. *Lueck*, 471 U.S. at 215.

301. *Hechler*, 107 S. Ct. at 2167-68.

302. A state breach-of-contract claim would certainly never exist but for a contract.

303. *Lueck*, 471 U.S. at 220.

304. For example, a common law wrongful discharge tort claim without a public policy base would be allowed to stand under a solely "but-for" approach. This is because the duty to not discharge without just cause is a state duty and would still exist without the contract. The

court should inquire whether reference to the labor contract is necessary for the resolution of the state-law claim. If reference to the contract is necessary, the court should preempt the claim. For example, a general state law tort claim of wrongful discharge available to all employees under state law would survive the first prong of the test but not the second. The wrongful discharge claim would survive the but-for step of the test because such claims are available to employees regardless of their contractual status. The duty to not discharge absent just cause would exist regardless of a labor contract.[305] The wrongful discharge claim would, however, be preempted under the second part of the test because, without a state law definition of wrongful discharge, reference to the relevant labor contract's just-cause provision and past practice under it would be necessary to resolve the state-law claim.[306] The refined test would not preempt state claims that can be resolved without reference to the labor contract and that can exist but for a provision of the contract.[307]

State workers' compensation discharge claims would not be preempted under the refined *Lueck* test. Under the first, but-for, part of the test, the workers' compensation discharge torts would survive because the claims exist for all employees regardless of whether they are covered by a labor contract.[308] Workers' compensation discharge torts would also survive the second part of the refined *Lueck* test because it is not necessary to refer to labor contracts' just-cause provisions in order to resolve the claims. The issue in a workers' compensation discharge claim would be whether the employer fired the employee solely for filing a valid claim, rather than on whether there were other justifications for the discharge.[309] *Lingle's* result would be incorrect under the refined *Lueck* test because the workers' compensation discharge claim can be brought absent a labor contract, and no reference to the contract is necessary in order to resolve the claim.

In sum, it is not a new section 301 preemption test that is proposed here, but merely a refinement of the Supreme Court's *Lueck* test. Such a clarification would preempt truly derivative and dependent state-law claims, and yet allow union employees to exercise certain minimal rights guaranteed by the state to all employees. The test, moreover, would be easy to apply and would guarantee more consistent results in the lower courts. Finally, the test

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analysis of the claim, however, would require reference to past practice under any labor contract with a just cause provision to determine what constitutes just cause. A second step, therefore, is needed to preempt such derivative state-law claims.

305. *See supra* note 308.

306. *Id. See also* Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987) (California's tort for breach of an implied covenant of good faith and fair dealing would also be preempted under part two of the refined test).

307. Generally, this analysis would allow state claims that further or protect important state public policies to be brought under state law regardless of whether the claims could have been grieved under the contract. *Accord* Note, *supra* note 19 (in result).

308. *Accord* Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 107 (2nd Cir. 1987).

309. *Id.* at 105-07.

would not injure the federal policies supporting preemption of some state laws that would escape preemption under section 301 but that nevertheless conflicted with federal law. The interplay between the various preemption doctrines would both protect the federal policies that concerned the *Lingle* court and obviate the necessity to extend *Lueck* beyond its logical limits.[310]

V. CONCLUSION

The majority in *Lingle* took an extreme position on a complex issue without adequate justification for doing so. The court engaged in needless repetition by treating section 301 removal and preemption as discrete and insular doctrines when, in reality, they are only occasionally distinguishable and always inherently related. The court also unnecessarily expanded *Lueck's* preemptive force and eliminated the clear limits placed on the *Lueck* test by the Supreme Court itself. The court did acknowledge those limitations, but could find no instance in which they would be applicable. Finally, the *Lingle* court parted ways with the majority of federal circuits, its own district courts, and the Illinois Supreme Court, without adequately answering their rationales and offering only an incomplete and occasionally faulty analysis, all in the name of federal labor policy. The *Lueck* test represents the Supreme Court's interpretation of federal labor policy, and the *Lingle* court did not have the authority to significantly alter the *Lueck* test as it did.

VI. POSTSCRIPT

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

The Supreme Court handed down its decision in *Lingle v. Norge Div. of Magic Chef, Inc.*[311] on June 6, 1988. Justice Stevens wrote for a unanimous Court and reversed the Seventh Circuit. The Court employed an analysis similar to that outlined in this Note to conclude that section 301 did not preempt Jonna Lingle's state tort action.

Recounting the origins of and rationale behind section 301 as articulated in *Lucas Flour*, the Court first reaffirmed *Lueck* and the "substantially dependent" test as a faithful application of the *Lucas Flour* principles.[312]

310. *See supra* notes 282-90 and accompanying text. The balance struck between the refined *Lueck* test and the NLRA preemption doctrines would serve the federal policy interests, the interest in preserving federalism, and employees' interest in obtaining full recovery for their employer's tortious conduct as well as the employers' interest in limiting their liability for breaches of contractual duties to bargained for contractual remedies.

311. 108 S. Ct. 1877 (1988).

312. *Id.* at 1881. The Court stated:

> Thus, *Lueck* faithfully applied the principle of § 301 preemption developed in *Lucas Flour*; if 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 and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.

Id.

The Court then summarized the elements of the Illinois workers' compensation discharge tort as requiring a plaintiff to "set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights."[313] Finding each element to involve an inquiry into the conduct of the employee and the conduct and motivation of the employer, the Court concluded that neither element required a court to interpret any term of a collective bargaining agreement.[314] The Court concluded that the Illinois tort claim was independent of the collective bargaining agreement and therefore not preempted under *Lueck* because the Court was not required to construe the agreement in order to resolve the claim.[315] In so stating the *Lueck* inquiry, the Court adopted the equivalent of the second prong of the test proposed by this Note but ignored use of the first, but-for, prong.[316]

The Court next repudiated the Seventh Circuit's "same issue" test, under which a state-law claim is preempted if it implicates the same analysis of the facts as would an inquiry under a provision of the collective bargaining agreement.[317] Concluding that such mere parallelism was insufficient to preempt a state-law claim under section 301, the court reasoned that, although the subject matter covered by the state law might be relevant for *Garmon* or balance-of-power preemption purposes, it was irrelevant under the section 301 preemption doctrine. The Court stated that the sole purpose

313. *Id.* at 1882 (quoting Horton v. Miller Chemical Co., 776 F.2d 1351, 1356 (7th Cir. 1985) (summarizing Illinois state court decisions), *cert. denied,* 475 U.S. 1122 (1986)).

314. *Id.* The Court went on to state that, in defending a workers' compensation discharge claim, an employer must show it had a non-retaliatory reason for the discharge. This also was found by the Court to be a purely factual inquiry, independent of the collective bargaining agreement. *Id.*

315. *Id.*

316. In a footnote, the Court elaborated as follows:

> Petitioner points to the fact that the Illinois right to be free from retaliatory discharge is non-negotiable and applies to unionized and non-unionized workers alike. While it may be true that most state laws that are not preempted by § 301 will grant non-negotiable rights that are shared by all state workers, we note that neither condition ensures nonpre-emption. It is conceivable that a state could grant a remedy that, although non-negotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301. Similarly, if a law applied to all state workers but required, at least in certain circumstances, collective-bargaining agreement interpretation, the application of the law in those instances would be pre-empted. Conversely, a law could cover only unionized workers but remain unpre-empted if no collective—bargaining agreement interpretation was needed to resolve claims brought thereunder.

Id. at 1882 n.7. Thus, the inquiry for the Court was limited to the equivalent of the second prong of this Note's proposed test. Of this, more will be said.

317. *See id.* at 1882-83. *See also supra* notes 171-74, 244-51 (further analyzing the Seventh Circuit's approach).

of section 301 preemption is to ensure that federal law will be the basis for interpreting collective bargaining agreements.[318] The Court found that this purpose was not threatened by the Illinois workers' compensation discharge tort.

The Court further found that its view of section 301's preemptive scope did not conflict with the federal policy favoring arbitration in resolving labor disputes. The Court reasoned that the interpretation of collective bargaining agreements remained firmly in the arbitral realm after *Lingle.* If resolution of the state claim did require interpretation of the agreement, it would be preempted under *Lingle.*[319] The Court, however, did recognize that tangential references to the collective bargaining agreement might be made in resolving the state claim without causing preemption.[320] Although a state court would be required to apply federal common law to these tangential contract issues under *Lincoln Mills*,[321] the issues would nonetheless be taken out of the so called "arbitral realm."

Finally, the Court found that its view of section 301 preemption was supported by the fact that certain statutory rights aimed at providing minimum substantive guarantees to individual workers have often been left unpreempted by the other labor law preemption doctrines.[322] As long as resolution of these rights does not require the interpretation of the collective bargaining agreement, the Court saw no reason why section 301 should be held to preempt them.[323]

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318. *Id.* at 1883. The Court then rephrased its conclusion as follows:

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

Id. (footnotes omitted).

319. *Id.* at 1884.

320. *Id.* at 1885 n.12. The Court reasoned:

> Thus, as a general proposition, a state-law may depend for its resolution upon the interpretation of a collective-bargaining agreement and a separate state law analysis does not turn on the agreement. . . . As we stated in *Allis-Chalmers Corp. v. Lueck,* . . . not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301 . . . .

Id. As an example of such a tangential reference, the Court posited as follows: "A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled." *Id.* (citing Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 106 (2d Cir. 1987)(raising the same example)).

321. 353 U.S. 448 (1957).

322. 108 S. Ct. at 1884-85.

323. The Court noted that even "[t]he Court of Appeals 'recognize[d] that § 301 does not pre-empt state anti-discrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge." *Id.* at 1885 (quoting Lingle v. Norge Div. of Magic Chef, Inc. 823 F.2d 1023, 1046 n.17 (7th Cir. 1987).

B. *Analysis of the Supreme Court's Opinion*

1. *Section 301 preemption after* Lingle

Although the Court's decision in *Lingle* goes a long way towards resolving the scope of section 301's preemptive effect, some questions remain.

Unlike the two-prong approach advocated in this Note, the Court stated that preemption is proper only when resolution of the state claim requires the court to construe the collective bargaining agreement.[324] Thus, the Court ignored an initial but-for prong which would determine preemption in the majority of cases, and more simply as well. Of course, this Note anticipates that the second prong of the proposed test would preempt all of the laws that would be preempted by the but-for prong. Any law completely dependent on a collective bargaining agreement would certainly be substantially dependent as well. The reason, however, for a first, but-for, prong is to limit lower courts' potential disagreement over the distinction between a preempted reference to a collective bargaining agreement from the nonpreempted "tangential" references discussed in footnote 12 of the Court's opinion.[325] The Supreme Court's single-prong approach, on the other hand, allows the argument over the definition of tangential references to extend to the entire range of section 301 preemption cases. As seen from the initial disagreement over the meaning of the term "substantially dependent" in *Lueck*, leaving the interpretation of this concept to the lower courts, can lead to widely disparate results.[326]

Moreover, the ambiguity created by the Court's use of a single-prong test may be a minor problem in contrast to the confusion caused by the explicatory language in the opinion. In a footnote, the Court rejected Lingle's argument that the Illinois workers' compensation discharge claim should not be preempted because it confers a nonnegotiable right on both unionized and nonunionized workers alike.[327] The Court first stated that section 301 preemption is not necessarily precluded by the nonnegotiability of a particular right. This is consistent with the proposed two-prong test. A statute incorporating a nonnegotiable right would merely survive the but-for test to reach the second prong.

The Court, however, neglected to state the inverse proposition, which is that all negotiable rights *are* preempted by section 301. Although, this proposition is arguably unnecessary because a negotiable right could usually only be discovered by construing the collective bargaining agreement, this will not necessarily always be true. For example, one can imagine a statute that provides a right to not be discharged except for just-cause only to

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324. *See supra* notes 314-16 and accompanying text.

325. *See supra* notes 298-307 and accompanying text (explaining that rationale for two-pronged inquiry is mainly to provide clarity).

326. *See supra* note 11 (listing widely disparate results in lower courts).

327. *Lingle*, 108 S. Ct. at 1882 n.7. *See also supra* note 316 (quoting relevant portion of footnote).

employees covered by collective bargaining agreements. Such a right would be negotiable because, if the parties did not agree to the labor contract, the right would not exist. Yet, construing the agreement would be completely unnecessary to the resolution of any claims under the hypothetical statute as long as "just-cause" was completely defined. The but-for prong of the proposed test would clearly preempt this statute; the Supreme Court's analysis, however, leaves significant doubt.[328]

Finally, the Court did nothing to correct the Seventh Circuit's faulty application of the complete preemption doctrine. The Court's silence regarding the issue encourages the growth of this doctrinal aberration.

2. *Balance-of-Power preemption after* Lingle

The effect of NLRA balance-of-power preemption on state-law tort claims and, in particular, workers' compensation discharge claims, remains open after *Lingle*. Although Norge, in its brief, referred briefly to *Garmon* preemption,[329] it did not raise balance-of-power preemption except to distinguish language in certain balance-of-power cases which had stated that balance-of-power preemption was not meant to preempt minimum state labor standards guaranteed to all workers.[330] Further, the issue largely remains open in the circuit courts of appeals. Only the Tenth Circuit Court of Appeals, in *Peabody Galion v. Dollar*,[331] has addressed the issue, rejecting the use of balance-of-power preemption in workers' compensation discharge claims.[332]

Although, as *Peabody* demonstrated, the case for balance-of-power preemption of workers' compensation discharge claims is weak, use of the doctrine does remain open in the majority of circuits. Moreover, workers' compensation discharge claims present a particularly ineffective balance-of-power preemption argument because workers' compensation is a peculiarly state regulated right. Therefore, its use against other state tort claims which do not involve workers' compensation may prove an important preemption

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328. These doubts are reinforced by the last sentence of the same footnote. There, the Court stated as follows: "Conversely, a law could cover only unionized workers but remain unpreempted if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder." *Lingle,* 108 S. Ct. at 1882 n.7.

329. *See* Brief for Respondent at 16 n.6, Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988) (No. 87-259). Norge claimed that "[i]t is by no means clear that Lingle's wrongful discharge claim is outside the protective scope of NLRA Section 7, 29 U.S.C. § 157, and hence preempted by that statute." *Id.* The Board, however, has expressly held that a single filing of a workers' compensation claim cannot constitute protected concerted activity within the meaning of § 7. Central Ga. Elec. Membership Corp. 269 N.L.R.B. 635, 635(1984). Norge neglected to cite *Central Georgia.*

330. *See* Brief for Respondent at 34-37.

331. 666 F.2d 1309 (10th Cir. 1981).

332. *See supra* notes 48-56 and accompanying text.

tool for employers after *Lingle*.[333] Thus, balance-of-power preemption should prove to be a key doctrine in the future development of federal preemption law. And, as discussed at an earlier point in this Note, use of the balance-of-power preemption doctrine will, in fact, be crucial in making sure that the states' expansion of workers' rights does not infringe substantially upon the NLRA's general approach favoring freedom of contract and volunteerism.[334]

3. *Use of the Federal Arbitration Act to enjoin state-law claims*

Finally, even if workers' compensation discharge claims cannot be preempted under either section 301 or the balance-of-power test after *Lingle*, it may still be possible to enjoin such a claim brought in state court under the Federal Arbitration Act.[335] That Act generally provides for the enforceability of agreements to arbitrate controversies arising out of contracts. The Act specifically applies to any arbitration agreement that is part of either a maritime transaction or a transaction involving commerce.[336] Section 3 of the Act, moreover, explicitly provides for a stay of any suit or proceeding brought in any of the courts of the United States which is based on an issue referable to arbitration.[337]

An employer and union could, therefore, as part of the collective bargaining agreement, provide that all workers' compensations discharge claims would be resolved by arbitration and thereby achieve a result somewhat similar to preemption. The collective bargaining agreement would substantively fall within the scope of the Act because an employer must affect interstate commerce in order to be covered by the federal labor laws in the first place.[338] The agreement would thus be "a contract evidencing a transaction involving commerce" within the meaning of the Act.

Nonetheless, the applicability of the Act to collective bargaining agreements regulated by the NLRA and the LMRA remains unclear because of conflicting interpretations of the Act's exclusionary clause. Section 1 of the Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers."[339] Whether a

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333. *See supra* notes 286-90, 310 and accompanying text (discussing importance of interplay between the preemption doctrines, and positing that appropriate use of the doctrines would adequately protect federal interests). *See also supra* notes 43-47 and accompanying text (discussing balance-of-power preemption generally).

334. *See supra* notes 287-89 and accompanying text.

335. 9 U.S.C. §§ 1-14, 201-08 (1982).

336. 9 U.S.C. § 2 (1982).

337. 9 U.S.C. § 3 (1982). Although the section refers rather ambiguously to "any of the courts of the United States," the Supreme Court has stated that the provision must apply to state as well as federal courts in order to make sense. Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.3 (1983).

338. *See supra* note 3.

339. 9 U.S.C. § 1 (1982).

collective bargaining agreement constitutes an employment contract is one issue which engenders much conflict. A minority of federal appellate courts have held that collective bargaining agreements are not contracts of employment and, therefore, are not excluded from the operation of the Act.[340] In these circuits, NLRA employers could clearly agree to arbitrate workers' compensation discharge claims. The majority position, however, is that collective bargaining agreements are contracts of employment and, thus, potentially excluded from the Act's coverage under section 1.[341]

Furthermore, if the majority position is followed, a question arises as to the types of employment contracts excluded by section 1. Some circuits have held that section 1 excludes all contracts of employment from the operation of the Act.[342] In these circuits, workers' compensation discharge claims would not be arbitrable if collective bargaining agreements are treated as employment contracts. Other circuits, however, have held that exclusion is limited to employment contracts of transportation workers.[343] Under this view, collective bargaining agreements regulated by the NLRA and the LMRA would not generally be excluded from the Act's coverage while those regulated by the RLA would be excluded. *Lingle* may very likely bring these long-time conflicts among the circuits to a head and force the Supreme Court to resolve them.

To conclude, the Supreme Court's decision in *Lingle* does much to clear up the ambiguities of *Lueck*. After *Lingle*, preemption of state-law claims by section 301 should, for the most part, be limited to those claims that are truly substantially dependent upon the collective bargaining agreement for their resolution. Questions, however, remain. The interplay between section 301 preemption and balance-of-power preemption has yet to be clarified. This interplay is critical under the narrow reading of section 301 preemption

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340. *See* Local 205 v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957); Hoover Motor Express Co. v. Teamsters, 217 F.2d 49 (6th Cir. 1954).

341. *See* American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987); San Diego Dist. Council v. Cory, 685 F.2d 1137 (9th Cir. 1982); International Ass'n of M. & A. Workers v. General Elec. Co., 406 F.2d 1046 (2d Cir. 1969); United Steelworkers v. Galland-Henning Mfg. Co., 241 F.2d 323 (7th Cir.), *rev'd*, 354 U.S. 906 (1957); Signal-Stat. v. Local 475, 235 F.2d 298 (2d Cir. 1956); United Elec. R. & M. Workers v. Miller Metal Prods., 215 F.2d 221 (4th Cir. 1954); Amalgamated Ass'n v. Pennsylvania Greyhound Lines, 192 F.2d 310 (3rd Cir. 1951); Mercury Oil Refining Co. v. Oil Workers, 187 F.2d 980 (10th Cir. 1951); International Union of United Furniture Workers v. Hardwood Flooring, 168 F.2d 33 (4th Cir. 1948).

342. *See* United Elec. R. & M. Workers v. Miller Metal Prods., 215 F.2d 221 (4th Cir. 1954); United Furniture Workers v. Colonial Hardwood Flooring, 168 F.2d 33 (4th Cir. 1948); Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944).

343. *See* Edwards v. Sea-Land Servs. Inc., 678 F.2d 1276 (5th Cir. 1982), *vacated and rem'd sub. nom.* International Bhd of Teamsters v. Edwards, 462 U.S. 1127, *modified on other grounds*, 720 F.2d 857 (1983); Dickstein v. DuPont, 443 F.2d 783 (1st Cir. 1971); Pietro Scalzitti Co., Inc. v. International Union, 351 F.2d 576 (7th Cir. 1965); Signal-Stat. v. Local 475, 235 F.2d 298 (2d Cir. 1956); Tenney Eng'g v. United R. & M. Workers, 207 F.2d 450 (3rd Cir. 1953); Legg, Mason & Co., Inc. v. Mackall & Coe, Inc., 351 F. Supp. 1367 (D.D.C. 1972).

endorsed by this Note, and now adopted by the Supreme Court. Finally, *Lingle* will likely bring to a head certain conflicts among the federal circuits concerning the Federal Arbitration Act. How the Supreme Court eventually resolves these conflicts could substantially affect the Arbitration Act's usefulness as a quasi-preemptive tool.

Lance C. Malina

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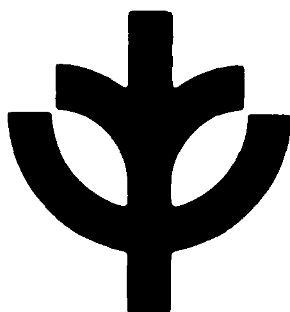

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