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Unsuccessful Employee Arbitrants Bring Wrongful Discharge Claims in State Court: The Accommodation of Public and Private Adjudication

I. Introduction

Courts in several states have recently narrowed the long-standing employment-at-will doctrine by recognizing claims for wrongful discharge. Wrongful discharge actions are based in con-

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1. As of this writing, all but nine states have abandoned the strict employment-at-will doctrine by recognizing some form of exception to it. The states that continue to follow the traditional doctrine are Colorado, Florida, Georgia, Iowa, Louisiana, Mississippi, Rhode Island, Utah, and Vermont. See Nat'l L.J., Jan. 20, 1986, at 6, cols. 2-3; see generally H. Perritt, Employee Dismissal Law and Practice (1985) (summarizing recent case law in all fifty states).

2. "Employment-at-will" is an expression of a legal aspect of an employment relationship which affords an employee a "right" to quit his employment at any time, and his employer a "right" to terminate the employment relationship at any time, for any reason, or no reason. Even today, this is the legal status of the vast majority of the workforce. Recent estimates put at-will employees at 60 to 65 percent of the workforce. Note, Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1816 n.2 (1980); see also Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404 (1967) (increased government scrutiny of employment-at-will needed as employers become larger and more powerful and as the realm of effective labor unionism contracts).

3. The term "actions in wrongful discharge," as used in this Comment, refers to legal actions arising out of the common law (actions sounding in tort or contract), public policy, or statutory law (e.g., workers' compensation statutes authorizing an employee to maintain an action for employer retaliation against an employee filing a workmens' compensation claim). To rely on public policy as grounds to challenge a discharge as wrongful, a plaintiff must prove that his dismissal would, if permitted to stand, damage in some way important social interests. A common application of the "public policy tort" is in cases where an employee is discharged or disciplined for refusing to do something illegal at the employer's request. See, e.g., Sabine Pilots Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (employee dismissed for refusing to dump effluents into a river in violation of federal law).

For an example of a workers' compensation statute that protects employees from retaliation for filing a claim, see N.Y. Work. Comp. Law § 120 (McKinney Supp. 1988).
tract, tort, public policy, or state statutes, and provide various remedies for discharged employees. The advent of these actions raises the issue of whether organized employees will have access to state courts to press their claims. The judicial response to this issue will further delineate the boundaries between the courts and arbitration in their respective roles as adjudicatory mechanisms in the labor relations context.

In the last two decades, legislatures and courts have taken an increasingly active role in reallocating rights in the employment relationship. For organized employees, this legislative and judicial activism has created a patchwork of rights and remedies arising from collective bargaining agreements, statutes, and common law. Recent decisions permitting state claims for wrongful discharge within the collective bargaining context continue the trend toward recognizing individual causes of action in the employment relationship. This trend has the potential to erode an important element of arbitration—finality. Moreover, the long-recognized advantages of arbitration as a method of industrial conflict resolution—informality, inexpensiveness, and expeditiousness—are jeopardized as arbitrators grapple with complex issues involving matters of public and private law. Although the use of arbitration

4. Remedies may be awarded in either tort or contract. Compensable in tort have been: pain, anguish, humiliation, embarrassment, and loss of consortium. Punitive damages are also available in tort. Tort-based awards have been found especially appropriate in cases involving the wrongful discharge of white-collar employees, who, "unlike their brothers in blue collars, are psychologically unprepared for the loss of security and status following on unemployment." Blades, supra note 2, at 1413.

Contract remedies exclude tort-based remedies, and are generally calculated in an amount equal to the wages or salary lost because of the employer's wrongful conduct, less any income earned in substituted employment. Damages may also include the cost of securing substitute employment. See id. at 1413-16. See also RESTATEMENT (SECOND) OF CONTRACTS § 350 comment b, comment c, illustration 8 (1981) (duty to mitigate damages in a breach-of-labor-contract situation).

5. The term "organized employee" will be used throughout this Comment to refer to employees represented by a union and subject to the terms of a collective bargaining agreement.

6. See infra note 43. Courts have interpreted this legislation and fashioned appropriate legal rights. See infra notes 69-101 and accompanying text.

7. See infra notes 111-42 and accompanying text.

8. This Comment observes that over the last two decades judicial decisions regarding arbitration have demonstrated a trend toward recognizing individual employment rights that exist within the collectivist context of labor-management relations. See infra note 149 and accompanying text.

9. The distinction between public and private law is not clear in any context, including
is on the rise, the courts' treatment of wrongful discharge cases adds a new dimension to the debate over the appropriate accommodation of arbitration and the courts.

This Comment asserts that the public function of promoting industrial peace is best served through collective bargaining. The courts are not adept at resolving workplace tension and should strive to support private dispute resolution. To support collective bargaining and arbitration, federal courts should severely limit the nature of state claims that are not preempted by federal law. Such a result would support collective bargaining by encouraging finality in arbitration and mitigate the unsettled expectations which arise when multiple adjudicatory forums exist.

This Comment arrives at the above conclusions by examining court cases of the last two decades involving arbitration. It focuses on the emphasis the courts place on arbitration's role. Section II briefly describes the judicial preference for arbitration expressed in the Steelworkers trilogy. Section III examines subsequent decisions which have shaped arbitration. Section IV contains observations concerning how the increase in public law in the employment context has affected the arbitration process. Section V highlights the recent cases involving wrongful discharge claims made by organized employees. Section VI explores how courts make initial determinations as to the source of employment rights and how this determination narrows the scope of arbitration provisions.

labor law. See Klare, The Public/Private Distinction in Labor Law, 130 U. Pa. L. Rev. 1358 (1982). This Comment will endeavor to use the terms "public law" and "private law" to distinguish between legal obligations arising from the consensual relations of non-public parties (private law), and obligations which are imposed on such parties by government (public law).


II. The Steelworkers Trilogy: Private Dispute Resolution at the Cornerstone of National Labor Policy

Modern grievance arbitration\textsuperscript{12} blossomed during World War II as a private means of resolving disputes over the interpretation or application of collective bargaining agreements. Earlier experiments with voluntary arbitration met with limited success,\textsuperscript{13} and compulsory arbitration was an anathema to union officials.\textsuperscript{14}

\textsuperscript{12} The term "arbitration" has meant different things throughout the years. In the late 19th century, the term was used to mean resolving labor disputes without a strike—an activity we would now call negotiation. See E. Witte, Historical Survey of Labor Arbitration 3-4 (1952).

In the early 20th century, the meaning of the term evolved beyond the concept of negotiation, and referred to the use of neutral third parties to resolve disputes. \textit{Id.} at 10, 16-28. The concepts of compulsory arbitration (government compelling parties to submit their disputes to neutrals) and voluntary arbitration (parties freely deciding whether to submit their disputes to neutrals) were articulated during this era, and each concept had its adherents. For a discussion of the public debate surrounding the compulsory versus voluntary arbitration issue, see B. Ramirez, When Workers Fight: The Politics of Industrial Relations in the Progressive Era, 1898-1916, at 160-74 (1978).

Today, arbitration is generally voluntary. Once the parties agree to arbitrate, however, the law may be used to compel arbitration in a proper case. See infra notes 19-36 and accompanying text.

Arbitration over terms to be included in a collective bargaining agreement is referred to as "interest" arbitration. Interest arbitration is most common in the public sector. Arbitration of disputes arising over the interpretation or application of the collective bargaining agreement is referred to as "grievance" or "rights" arbitration. Grievance arbitration is found in both the public and private sectors. The term "arbitration" as used in this Comment refers to grievance arbitration only. For a general discussion of the arbitration process, see R. Fleming, The Labor Arbitration Process (1965).

\textsuperscript{13} Labor and management in the newspaper and clothing industries used voluntary arbitration as early as the beginning of the 20th century. Such procedures were usually adopted after prolonged strikes in those industries. See generally E. Witte, \textit{supra} note 12. What success was had was often a result of the respect the parties had for the arbitrators (Louis Brandeis, later an Associate Justice of the Supreme Court, was an arbitrator in the clothing industry), and the ability of unions and management to educate their constituents on how to use the new process. This was no easy task, particularly in intensely competitive markets where management especially would be loathe to agree to any undertaking that might put it at a competitive disadvantage (as where arbitrators ruled substantially in favor of the workers). Most voluntary arbitration systems failed because of the inability to compel its use or to enforce awards. See generally J. Carpenter, Competition and Collective Bargaining in the Needle Trades, 1910-1967 (1972).

\textsuperscript{14} Samuel Gompers came out strongly against compulsory arbitration in 1892 and remained staunchly opposed to it throughout his lifetime. As Gompers stated, After I opposed bills for compulsory arbitration and compulsory enforcement of the terms of arbitration, I have frequently been asked what I would propose as a substitute. My invariable reply was: "Strikes are due to the workers' conditions or an aspiration for a better life. There is nothing you can do by law to prevent these normal movements and actions of the working people."
Wrongful Discharge

Workers, unions, and management gradually accepted arbitration during the war because the government provided incentives for its use, and it provided an attractive alternative to the strikes which threatened the production of war materials. The incentive to arbitrate came with the government's decision to provide unions with attractive union security arrangements as the quid pro quo for no-strike clauses and agreements to arbitrate. Union security clauses made dues collection much easier. Subsequently, union treasuries became healthy, and unions were able to more effectively represent their members and organize new locals. Strong unions were able to direct their members to achieve gains through bargaining rather than strikes. Effective collective bargaining eliminated the need for further government intervention in the form of compulsory arbitration or industry takeover. The role arbitration played during the war was recognized, and it gained congressional and judicial support soon thereafter.

Shortly after World War II the Labor-Management Relations Act was enacted. Congress explicitly assented to arbitration in section 203(d) of the Act:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Congress favored arbitration over strikes or litigation as the preferred method of industrial dispute-resolution. Problems with the process arose, however, when parties to collective bargaining agreements containing arbitration clauses chose not to arbitrate, or chose to ignore an arbitrator's decision. It was at this point in the voluntary arbitration process that a major weakness was exposed—arbitration awards were not enforceable in federal court.


16. Id. at 232.


In *Textile Workers Union v. Lincoln Mills*, the Supreme Court held that section 301 of the Act provided a remedy for a party seeking to compel either arbitration or compliance with an arbitrator's award. Thus, the Court established that section 301 was intended to be the "sanction behind agreements to arbitrate," and that federal law was to be fashioned to carry out this intent. This is significant because a uniform system of federal law for enforcing arbitration clauses in collective bargaining agreements would preclude the patchwork of variability inherent in a system of state enforcement.

Thereafter, the body of federal law regarding arbitration was crafted. In 1960, the Supreme Court handed down a series of cases, since then known as the *Steelworkers* trilogy. The trilogy is the legal foundation upon which modern labor arbitration rests, and it has taken on meaning beyond the literal interpretation the Court ascribes to the nature and function of arbitration. These cases place arbitration at the cornerstone of our national labor policy as an essential instrument of industrial peace.

In the first reported trilogy case, *United Steelworkers v. Ameri-

20. Section 301(a) provides:

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

21. In *Lincoln Mills*, a union filed several grievances concerning work loads and work assignments. The employer denied these grievances, the union requested arbitration, and the company refused. Subsequently, the union sought to compel arbitration through section 301 of the Taft-Hartley Act. The issue before the Supreme Court—whether section 301 was ever intended to be used to compel arbitration or compliance with an arbitrator's award—had received mixed treatment in the lower courts. See 353 U.S. at 450-51. The Supreme Court granted certiorari "because of the importance of the problem and the contrariety of views in the courts." *Id.* at 449.

The Court ruled in favor of the union noting that "[i]t seems . . . clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes . . . . We conclude that the substantive law to apply in suits under section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456.

22. *Id.* at 456.
23. *Id.*
24. See *supra* note 11.
can Manufacturing Co., the Court established that arbitrators, not the courts, should decide the arbitrability and the merits of a dispute. In reaching this conclusion, the Court made several assumptions regarding the nature and function of arbitration. The Court implied that arbitrators have more sensitivity to the subtleties and tensions in the industrial environment and are better equipped than judges to make decisions in this setting. The Court also indicated a keen respect for collective bargaining and arbitration as stabilizing forces in relations between labor and capital, and key elements in the quest for industrial peace.

In the second reported case, United Steelworkers v. Warrior & Gulf Navigation Co., the Court concluded that unless the parties specifically exclude particular matters, the arbitrator is empowered to hear all disputes arising from the interpretation or application of the collective bargaining agreement. Many of the same sentiments expressed in American Manufacturing were echoed. Spe-

25. 363 U.S. 564 (1960). This case involved a union that filed suit under section 301 to compel arbitration of a dispute arising out of the employer's refusal to reinstate an employee who had suffered a partially disabling work-related injury. The District Court for the Eastern District of Tennessee examined the merits of the case and granted the employer's motion for summary judgment; the court of appeals affirmed, 264 F.2d 624 (6th Cir. 1959). The Supreme Court reversed, 363 U.S. 564 (1960), noting that

[t]here is no exception in the "no strike" clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other. . . . The courts, therefore, have no business weighing the merits of the grievance . . . . The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.

363 U.S. at 567-68 (footnotes omitted).

26. "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." Id. at 568.

27. "[T]he grievance may assume proportions of which judges are ignorant." Id. at 567.

28. "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." Id.

29. "[W]e think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." Id.

30. 363 U.S. 574 (1960). In this case a union filed suit under section 301 to compel arbitration of a dispute arising when the employer contracted out work previously done by employees who had been laid off. The lower courts agreed that the complaint should be dismissed. 168 F. Supp. 702 (S.D. Ala. 1958), aff'd, 269 F.2d 633 (5th Cir. 1959). The Supreme Court reversed, 363 U.S. 574 (1960), and established limits for judicial inquiry into arbitral processes. "[T]he judicial inquiry under section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made . . . . Doubts should be resolved in favor of coverage." Id. at 582-83.
cial credence was given to the abilities of arbitrators. Attributes of the process, such as its informality, were stressed. The Court declared that arbitration is part of a new order, one that will replace the "older regime of industrial conflict."

In the final trilogy case, United Steelworkers v. Enterprise Wheel & Car Corp., the Court announced that an arbitrator's award is legitimate "so long as it draws its essence from the collective bargaining agreement." Again, the Court upheld the authority of arbitrators, and provided further guidance concerning the limited nature of judicial review of arbitration decisions. In addition, the Court explicitly supported the parties' intention that the award be final.

The trilogy set arbitration on firm ground as a private dispute-resolution mechanism; arbitration awards were enforceable in court, and arbitrators were free to decide the arbitrability and merits of grievances so long as remedies drew their essence from the collective bargaining agreement. The Court's focus was on arbitration's function. The language in the opinions conveyed an appreciation for the lessons of history, and the success arbitration achieved in resolving one of our society's more complex problems—a means of achieving industrial peace.

31. "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in her personal judgment to bring to bear on considerations which are not expressed in the contract as criteria for judgment." Id. at 582.
32. See id. at 578.
34. 363 U.S. 593 (1960). In this case the union filed suit over the employer's refusal to comply with an arbitration award directing the reinstatement of several employees with partial back pay. The district court directed the employer to comply with the agreement. See 168 F. Supp. 308 (S.D. W. Va. 1958), The court of appeals, however, would not order enforcement of the award because the collective bargaining agreement had since expired. See 269 F.2d 327, modifying 168 F. Supp. 308 (S.D.W. Va. 1958). The Supreme Court effectively affirmed the district court judgment, with a modification in the manner in which back pay would be calculated, 363 U.S. 593 (1960), modifying 269 F.2d 327 (4th Cir. 1959), contending that, "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards . . . . [The arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." 363 U.S. at 596-97.
35. 363 U.S. at 597.
36. "This plenary review by a court of the merits would make meaningless the provi- sions that the arbitrator's decision is final, for in reality it would almost never be final." Id. at 599.
III. ADJUDICATION OF PUBLIC RIGHTS IN A PRIVATE FORUM

The character of the employee/employer relationship in the United States before 1935 could best be described as private, and took the form of either collective agreements,37 individual agreements38 or employment-at-will.39 In 1935, however, the National Labor Relations Act40 placed over this relationship a broad statutory framework designed to encourage employee efforts to organize and engage in collective bargaining. Within this broad framework employers and unions were free to negotiate terms and conditions of employment, including conditions under which employees could be discharged. Thus, other than a specific prohibition against discharging employees for engaging in union activities,41 the Act did not by itself provide employees with protection from arbitrary dismissal. Any such protection had to come from a "just cause" provision42 in the collective bargaining agreement. Since 1935, other legislation affecting the employment relationship has been enacted.43 Courts have also interpreted legislation44

38. The individual employment contract has existed in various forms for centuries. For an example of a 17th century contract binding an apprentice to his master, see S. McKee, LABOR IN COLONIAL NEW YORK, 1664-1776, at 69 (1965). For examples and analysis of 19th century labor contracts used in the manufacturing trade, see C. Ware, THE EARLY NEW ENGLAND COTTON Manufacture: A STUDY IN INDUSTRIAL BEGINNINGS 160-68 (1966).
39. See supra note 2.
40. In 1935, Congress passed the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), which gave employees the legal right to organize for purposes of collective bargaining. This was the first piece of federal legislation substantially affecting the employment relationship to pass Supreme Court review.
42. A majority of collective bargaining agreements have some form of termination for cause provision. These sections limit the right of employers to discharge employees. Typically, employees subject to termination are given notice and a hearing. Employees may subject their discharge to the grievance procedure and arbitration.
and fashioned common law that has added to the public rights employees have in the employment relationship. Nonetheless, in comparison with other western democracies, there is still much that is private within the sphere of the employment relationship.

The modern collective bargaining agreement often serves as the “charter” of this essentially private relationship. Parties to a collective bargaining agreement often agree to settle their disputes through a grievance procedure ending with arbitration. Yet, if a situation occurs whereby an employee has “dual rights” (i.e., private contractual rights and public rights), tensions may exist between arbitration and the courts. The manner in which this tension has been resolved has influenced the arbitration process, and will continue to shape the role of arbitration amidst the ever-changing legal framework of the employment relationship.

A. LMRA Rights Asserted in Arbitration: The NLRB Position on Deference

The most significant statutory influence in the employment relationship is the LMRA. Section 7 guarantees the right of employees to organize and bargain collectively, while section 8 establishes unfair labor practices when section 7 rights are abrogated. The National Labor Relations Board, which was commissioned to administer the act, has fashioned a policy with

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44. Many of the cases discussed in this Comment are predicated on statutory provisions.

45. Common law exceptions to the employment-at-will doctrine have occasionally created not only rights for employees, but causes of action against employers enforceable by those same employees. For example, an employee, otherwise employable-at-will, could not be dismissed because she refused to publicly expose herself at a function unrelated to her job duties. See Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985). See generally Nat’l L.J., Jan. 20, 1986, at 1 (stating that most American jurisdictions have abandoned the employment-at-will doctrine as a strict formulation).


47. The Supreme Court has noted that the collective bargaining agreement is “rightly viewed as the charter instrument of a system of industrial self-government.” United Steel-workers v. American Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring).


49. Id. § 157.

50. Id. § 158 (a), (b), (c).

51. Id. § 153. The National Labor Relations Board [hereinafter “the Board” or “the
regard to its treatment of cases involving statutory issues arising under the LMRA.

Under the *Spielberg* doctrine, the Board will defer to arbitration awards when: (1) the proceedings have been fair and regular; (2) all parties have agreed to be bound by the arbitrator's decision; and (3) the decision is not clearly repugnant to the purposes and policies of the Act. In 1963, the Board added a fourth requirement to its deferral policy when it ruled that the arbitrator must have clearly decided the statutory issue arising under the Act. In 1971, in *Collyer Insulated Wire*, the Board went a step further in its support of the arbitration process by creating a rule requiring exhaustion of the arbitral process before it would agree to conduct a hearing on an unfair labor practice charge. In 1972, the Board made it clear that the "*Collyer* ap-

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NLRB"] was established in 1935 through the passage of the National Labor Relations Act, ch. 372, § 3, 49 stat. 449, 451 (1982). In broad terms, the National Labor Relations Board is empowered with establishing and effectuating national labor policy. This is accomplished through the Board's primary functions in administering the NLRA, namely, conducting representation elections and ruling on unfair labor practice charges. Board decisions are reviewable in federal court at the appellate level. For a detailed description of the Board, see generally F. McCulloch & T. Bornstein, *The National Labor Relations Board* (1974). For an evaluation of the Board's administrative and rule making functions, see E. Miller, *An Administrative Appraisal of the NLRB* (3d ed. 1980).

52. See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). The NLRB has a policy favoring deference to arbitration even in cases involving individual statutory rights. The fact that the Board, responsible for administering the Taft-Hartley Act, maintains a vigorous policy of deference to arbitration, while federal courts steadfastly decline to so defer, is an enigma in federal labor policy. See generally Moses, *Deferral to Arbitration in Individual Rights Cases: A Re-Examination of Spielberg*, 51 Tenn. L. Rev. 187 (1984) (discusses the incongruous position of the courts and the NLRB with respect to the policy of deference).

In response to this conflict, some commentators have proposed a federal labor court to provide a uniform approach to labor law. See, e.g., Morris, *The Case for Unitary Enforcement of Federal Labor Law—Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 Sw. L.J. 471, 499-506 (1972). Presumably, a unitary system of labor law enforcement would provide for a uniform deferral policy and thus eradicate the present confusion.

53. 112 N.L.R.B. at 1082.

54. See *Raytheon Co.*, 140 N.L.R.B. 883, 885 (1963) (reversing an arbitrator's decision that had failed to "touch" the basic statutory issue involved in the dispute—whether an unfair labor practice existed).


56. Id. at 842. The NLRB countered arguments that its decision in *Collyer* "stripped" the parties of their statutory rights, including a right to appeal to the Board, first by expressing its confidence in the efficacy of arbitration and grievance procedures, and then by noting that "by our reservation of jurisdiction, we guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function [lawfully]." Id. at 843 (em-
proach” applied even in cases involving an employee’s exercise of individual section 7 rights. In Olin Corp., the Board clarified its approach to deference in cases involving individual statutory rights, and held that it would defer to an arbitrator’s consideration of a statutory issue under the Act if: “(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.”

B. Other Statutory Rights Asserted in Arbitration: The Courts’ Position on Deference

The federal courts have been called upon to decide what effect arbitral decisions have on individual claims made pursuant to federal statutes. Title VII of the Civil Rights Act of 1964 permits individual causes of action against employers who commit acts of unlawful employment discrimination. Under the analysis of Alexander v. Gardner-Denver, courts will not defer to arbitral
decisions when employees assert Title VII claims. The Court began its analysis of the case by examining the legislative intent of the Civil Rights Act, explaining that "[t]he clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." The Court implied that its position was consistent with the standard of judicial review established in the Steelworkers trilogy by noting that an employee "instituting an action under Title VII, . . . is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." The Court further clarified the arbitrator's role as one involving "questions of contractual rights, rather than public laws." Further, the Court implied that the parties were not free to bargain over statutory rights because the collective bargaining agreement cannot "constitute a binding waiver with respect to an employee's rights under Title VII." The Court concluded that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

Alexander was decided fourteen years after the trilogy, and was based on a statutory cause of action that did not exist when the trilogy was decided. It was the first time the Supreme Court ruled on a question involving tension between the judicial forum for adjudicating statutory rights, and the arbitral forum for adju-

346 F. Supp. 1012 (D. Colo. 1971), and held "that petitioner, having voluntarily elected to pursue his grievance to arbitration under the non-discrimination clause of the collective bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII." 415 U.S. at 43. The court of appeals affirmed. 466 F.2d 1209 (10th Cir. 1972) (per curiam). The Supreme Court reversed, 415 U.S. 36 (1974), refusing to find that arbitration had a preclusive effect on a Title VII claim, or that the courts should adopt a rule for deference to arbitral decisions. See id. at 54-59.

64. 415 U.S. at 48-49.
65. Id. at 54.
66. Id. at 53-54.
67. Id. at 51.
68. Id. at 59-60.
indicating contractual rights. The Court’s ruling treated this tension as if it did not exist, and raised the question of whether the Court’s holding would be extended to other statutes which grant individual rights in the employment relationship.

That question was answered seven years later when the Court decided *Barrentine v. Arkansas-Best Freight System, Inc.* The issue before the Court was whether an employee could bring a statutory claim in the courts under the minimum wage provisions of the Fair Labor Standards Act after having submitted essentially the same claim to arbitration under the terms of the union’s collective bargaining agreement. The Court, extending the rationale of *Alexander*, held “that petitioners’ claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures.” In drawing this conclusion the Court noted that “the FLSA rights petitioners seek to assert in this action are independent of the collective-bargaining process.” The Court then turned to the issue of the tension between the forums for adjudicating individual and collective rights. It encouraged the resolution of disputes through arbitration, and guaranteed individual statutory rights as well, explaining that, although “courts should defer to an arbitral decision where the employee’s claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.”

This holding is significant not only because the *Alexander* holding was extended, but also because the nature of the right at stake can be distinguished from the “fundamental” right at

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72. 450 U.S. at 730.
73. Id. at 745.
74. Id.
75. Id. at 737.
76. Chief Justice Burger suggested an approach which would permit a judicial forum for claims which otherwise could be pursued in arbitration when these claims involve “fundamental” rights. See id. at 749-52 (Burger, C.J., dissenting). The doctrinal analysis of the nature of a right could follow closely the Court’s analysis of fundamental rights under the equal protection clause. See Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental “Rights” or “Interests” Through a Flexible Conception of Equal Protection*, 1977 Duke L.J. 143.
stake in Alexander. In his dissent, Chief Justice Burger recognized the different nature of these rights, arguing

that [a] fundamental right [a workplace free from discrimination] is not and should not be subject to waiver by a collective-bargaining agreement negotiated by a union. But there obviously is a vast difference between resolving allegations of discrimination under the Civil Rights Act and settling a relatively typical and simple wage dispute.77

Barrentine spurred at least one commentator to predict that nearly any individual statutory claim could be litigated independent of a grievance arising out of a collective bargaining agreement.78

The Court recently confirmed the prediction that the Alexander holding would be extended to other statutory causes of action when it decided McDonald v. City of West Branch.79 McDonald involved a police officer who arbitrated his discharge from employment.80 He lost the arbitration and then filed a claim under section 1983 of the Civil Rights Act of 1871,81 alleging that he was discharged for exercising his first amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances.83 The Court allowed McDonald to pursue his section 1983 claim, holding that "a federal court should not afford res judicata or collateral estoppel to effect an award in an arbitration ...."84

The Court frequently quoted from its Alexander and Barrentine decisions and reached the predictable conclusion that "an arbitration proceeding cannot provide an adequate substitute for a judicial trial. Consequently, according preclusive effect to arbitration awards in section 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide."85 This result is predictable because, to the degree that the nature of the right is at issue, constitutional rights under the first amendment are more closely related to the "fundamental"

77. 450 U.S. at 749.
80. Id. at 286.
82. See U.S. CONST. amend. I.
83. Id.
84. 466 U.S. at 292.
85. Id.
rights\textsuperscript{86} at stake in \textit{Alexander}, than to the "typical and simple" dispute in \textit{Barrentine}. Even though the Court rejected the argument that arbitration precluded the statutory claim, the Court reaffirmed its \textit{Alexander} and \textit{Barrentine} conclusion that the arbitrator's findings could be considered as evidence in a de novo trial.\textsuperscript{87}

Two recent Ninth Circuit cases, \textit{Criswell v. Western Airlines, Inc.}\textsuperscript{88} and \textit{Amaro v. Continental Can Co.}\textsuperscript{89} demonstrate the lower federal courts' willingness to follow the Supreme Court's lead in extending the \textit{Alexander} holding to apply to other individual statutory rights within the employment context. In \textit{Criswell}, the court held that actions arising under the Age Discrimination in Employment Act\textsuperscript{90} can be brought independently from a claim arising from the collective bargaining agreement.\textsuperscript{91} One of the issues before the court of appeals in \textit{Criswell} was whether the district court failed to accord proper deference to the arbitral determination denying relief. The court noted that while the right to appear before the arbitration board was contractual, the individual right asserted was derived from the ADEA.\textsuperscript{92} The court reviewed the case in light of \textit{Alexander} and \textit{Barrentine}, and declared that "the factors which initially prompted the Supreme Court to reject deference to arbitration decisions in these instances [\textit{Alexander} and \textit{Barrentine}] apply squarely to the facts in this situation."\textsuperscript{93} The court noted that the district court did admit the arbitral findings as evidence and accorded the findings the appropriate weight.\textsuperscript{94} The court did not, however, suggest what would constitute an appropriate measure of weight to be given to arbitral findings.

\textsuperscript{86} See Yarbrough, supra note 76.
\textsuperscript{87} 466 U.S. at 292-93 n.13.
\textsuperscript{88} 709 F.2d 544 (9th Cir. 1983), \textit{aff'd}, 105 S.Ct. 2743 (1985).
\textsuperscript{89} 724 F.2d 747 (9th Cir. 1984).
\textsuperscript{91} 709 F.2d 544, 548 (9th Cir. 1983), \textit{aff'd}, 105 S. Ct. 2743 (1985). Plaintiff airline pilots had been forced to retire because of age. They had sought instead to "bid down" to second officer positions, and after being retired, submitted a claim arising out of the seniority provisions of their collective bargaining agreement. An arbitration panel, known as the "System Board," denied relief. Subsequently, they filed an action in district court under the Age Discrimination in Employment Act. In deciding for the plaintiffs, the district court did not defer to the System's Board's findings, but took its findings as evidence. 514 F. Supp. 384, 392 n.14 (C.D. Cal. 1981). The court of appeals affirmed, 709 F.2d 544 (9th Cir. 1983), as did the Supreme Court, 105 S. Ct. 2743 (1985).
\textsuperscript{92} 709 F.2d at 548.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 548-49.
In *Amaro*, the court of appeals decided two issues regarding the effect of arbitration on a statutory claim arising under the Employee Retirement Income Security Act: 95 first, whether an arbitration award is res judicata of an ERISA claim arising out of the same facts; and second, whether arbitration procedures must be exhausted before bringing an ERISA claim. 96 In considering these issues the court explained that while both the grievance and the statutory claim arose from the same set of facts, they involved independent legal rights. 97 Having concluded that different sets of legal rights were involved, the court held that the doctrine of res judicata could not apply. 98 On the issue of exhaustion of the grievance remedy, 99 the court could not distinguish this case from *Alexander* or *Barrentine*, and held that individuals bringing claims under ERISA are "not required to exhaust grievance or arbitration proceedings prior to bringing an action under section 510 of ERISA." 100 The court also noted that ERISA rights, like rights under Title VII and the FLSA, are non-waivable. 101

IV. Arbitrators Grapple with Public Law Issues

The evolution of our society is reflected in our legal system. The threat industrial strife posed to our society in an earlier time is indicated by the language of the *Steelworkers* trilogy. The decades that followed brought other concerns in the industrial relations context. In the 1960's, when the institution of collective bargaining was flourishing, attention turned to the problem of employment discrimination. Legislation of the 1970's focused on safety, pension rights and other individual worker concerns. In the 1980's, state claims for wrongful discharge have emerged. The courts have not abandoned the national policy favoring col-

96. 724 F.2d at 748. In this case employees filed a grievance alleging that they were laid off because work had been shifted to another plant in violation of their collective bargaining agreement. Upon losing the arbitration, these employees filed an action under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982), alleging that they were laid off to prevent them from accumulating the required number of years to qualify for a pension. 724 F.2d at 748.
97. 724 F.2d at 748-49.
98. Id. at 749.
99. Id. at 750.
100. Id. at 752.
101. Id.
lectic bargaining, but the language of recent decisions reflects current concerns, and is materially different from the language of the era before the Civil Rights Act. Today's language reflects a trend, or policy, of recognizing individual rights in the employment relationship and showing less deference to arbitration.

Despite the courts' increased recognition of individual rights, and their reluctance to defer to arbitration, the arbitration process appears to be in a healthy state. The use of arbitration, and consequently, the number of arbitrators, continues to increase. The prophecy that permitting a later resort to a judicial forum "would sound the death knell for arbitration" has not come true. Surprisingly, there is little research related to how arbitration has been influenced by the court decisions of the last two decades. To evaluate the impact of these cases on the arbitration process, data should be collected to indicate what percentage of arbitrations involve statutory or common law issues, and what percentage are challenged in court. These and other threshold questions need to be explored before insightful statements can be made regarding the impact of these cases. It is undoubtedly true that a significant majority of arbitration cases do not involve public law issues. Rather, the disputes are over the interpretation or application of the collective bargaining agreement. Thus, the net impact of the cases discussed above on arbitration may be minimal. However, these cases have heightened arbitrators' sensitivity to public law issues. The potential for a residual effect on the arbitration process exists.

A residual impact from these cases occurs when arbitrators alter their hearing procedures in attempts to accommodate reviewing courts, or courts which may consider their findings as evidence. The advantages of arbitration include its informality, and the fact that it is less expensive and less time-consuming than litigation. The challenges presented by public law issues may lead arbitrators to invoke practices eliminating these advantages. It is ironic that courts criticize arbitration as an inferior adjudicatory mechanism,
ous consideration to public law issues. As the Supreme Court noted in Alexander, "[w]here an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight." In establishing the “such weight as the court deems appropriate” standard, the Court encouraged arbitrators to thoroughly consider statutory claims. If the arbitrator does so, in the hope that his or her findings will be given “great weight,” he or she must also pay heed to the courts’ criticisms of the arbitration process by producing a more detailed record, swearing witnesses, and using stricter evidentiary standards. In adapting, the arbitration process begins to lose its advantages and becomes more costly, more time-consuming, and more formal. When this occurs, the residual effect of these cases is complete, and the real benefits of arbitration are lost. Arbitration which resembles litigation in most respects is not an alternative dispute resolution mechanism that would be attractive to parties to a collective bargaining agreement.

Moreover, arbitrators receive contradictory signals from the courts and the NLRB concerning the role of arbitration. In contrast to the courts, the Board’s policy is clear: arbitrators must decide statutory issues arising under the Act. Because the Board has a well-developed deferral policy, the threat to the arbitration process inherent in making it more formal is not as great in cases that may arise under the LMRA. Thus, arbitrators are aware that in order to decide a grievance they must decide the statutory issue with an eye toward the Board’s deferral policy. Arbitrators and the parties know this ahead of time, therefore, the fact that an arbitration may be less formal is understood by the parties. In this scenario, the arbitration is expected to be a quasi-judicial forum, subject to Board and court review.

The courts have not, however, clarified the role arbitrators should take to deal with other statutory issues. On one hand, arbitrators are told they lack the competence and the authority to decide statutory issues. On the other hand, they are encouraged,

to judicial processes in the protection of Title VII rights”).

105. Id. at 60 n.21.
106. Id. at 60.
107. See supra notes 54-60 and accompanying text.
108. 415 U.S. at 56 ("arbitration [is] a comparatively inappropriate forum for the final resolution of [Title VII] rights"); see generally id. at 56-58.
as discussed above, to fully consider statutory issues so that their findings can be accorded "great weight" as evidence. Since courts have not provided any standards to measure the weight to be applied to an arbitrator's findings, no arbitrator can ever be sure whether the attention he or she pays to a statutory issue will be afforded any weight. The arbitrator who must decide whether to consider a statutory issue ultimately makes a choice which affects the conduct of the hearing—a choice that translates into time and money for the parties. As suggested above, the parties do not want a prolonged and expensive arbitration process.

Employers and unions have little control over how the arbitrator will treat a public law issue, yet there are steps they can take to change the arbitration process. Appointing a permanent arbitrator, could give the parties a voice in how they wish their hearings to be conducted.109 Other measures, such as expedited arbitration,110 will continue to be considered if the traditional arbitration process does not meet the needs of the parties.

V. ARBITRATION AND WRONGFUL DISCHARGE

A new development which may have a significant impact upon the labor arbitration process is unfolding. State actions for wrongful discharge111 are being pursued by organized employees, despite the fact that the claim may have been previously submitted to an arbitrator under the grievance procedure of a collective bargaining agreement. Federal courts have been called upon to decide whether these state claims are preempted by federal labor law.112 Recently, in Peabody Galion v. A.V. Dollar,113 Garibaldi v.  

109. Permanent arbitrators may usually be removed at the request of either party. This fact encourages arbitrators to satisfy the parties, at least on the procedural level.
111. See supra note 3.
112. State claims in the labor relations context are subject to preemption by federal law under the supremacy clause. U.S. Const. art. VI, § 2. Section 301(a) of the Taft-Hartley Act, see supra note 20 (text of section 301(a)), authorizes suits for violations of collective bargaining agreements and is the federal law which preempts state claims. Typically, when employees file state law-based actions against their employers, the employers seek to remove to federal court on the grounds that the claim is, in fact, based on a collective bargaining agreement. See generally Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1472-73 (9th Cir. 1984) (discussion of removal theory). Removal is then granted by 28 U.S.C. § 1441(a) (1982) (any state action over which federal courts have original jurisdiction may be removed to federal court).
Lucky Food Stores, Inc.,114 and Olguin v. Inspiration Consolidated Copper Co.,116 federal circuit courts have considered this issue, and have decided that under certain circumstances state claims may be brought by organized employees.

In Peabody Galion several employees claimed they were discharged because they filed worker’s compensation claims.116 The Tenth Circuit Court of Appeals addressed the following issues: (1) whether an Oklahoma statute dealing with retaliatory discharge for the filing of workers’ compensation claims was preempted by federal labor law; (2) whether the federal policy favoring arbitration precludes the application of the state statutes; and (3) whether the action under the state statutes violated state law pertaining to exclusivity of remedies.117

The court held that the state statute was not preempted by federal labor law.118 The court explained: “[W]e foresee no likelihood of frustration of national labor policies. . . . [T]his statute would stand up under analysis and would fit within the ‘state con-

The reason employers do this is that the burden on the plaintiff is two-tiered under the substituted federal law. The plaintiff must establish that the union breached its duty of fair representation and that the employer breached the “just cause” provision of the agreement. See 740 F.2d at 1476. For an analysis of the effectiveness of these suits, see Goldberg, The Duty of Fair Representation: What the Courts Do In Fact, 34 BUFFALO L. REV. 89 (1985).

Traditional state interests have been recognized in the federal law of labor relations. Such interests are sustained against federal preemption, for example, when they are “deeply rooted in local feeling and responsibility.” See, e.g., Belknap, Inc. v. Hale, 463 U.S. 491, 498 (1983) (fraud and misrepresentation); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (trespass); Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977) (intentional infliction of emotional distress). However, “[i]n such cases, the state’s interest . . . is balanced against [the interests of federal labor law].” Belknap, 463 U.S. at 498-99. For an analysis of the current state of the federal preemption doctrine, see Comment, Strikebreakers, The Supreme Court, and Belknap, Inc. v. Hale: The Continuing Erosion of Federal Labor Preemption, 33 BUFFALO L. REV. 839 (1984).

113. 666 F.2d 1309 (10th Cir. 1981).
114. 726 F.2d 1367 (9th Cir. 1984), cert. denied, 105 S. Ct. 2319 (1985).
115. 740 F.2d 1468 (9th Cir. 1984).
116. 666 F.2d at 1312. The dispute grew out of the fact that Peabody laid off 34 employees who previously filed workers’ compensation claims and were found to be partially disabled. These layoffs amounted to discharges because the nature of the recall provisions in the agreement were such that suitable jobs were not available for these employees. The employees filed grievances, two of which went to arbitration. Peabody won these arbitrations and three of the discharged employees filed suit pursuant to OKLA. STAT. ANN. tit. 85, §§ 5-7 (West 1970 & Supp. 1984-1985) which authorizes “retaliatory discharge” actions. 666 F.2d at 1312.
117. 666 F.2d at 1313.
118. Id. at 1323.
cern’ exceptions to the preemption requirement.” On the issue of whether federal law precludes the application of the state statute the court held that the arbitration provisions in the collective bargaining agreement did not preclude the statutory action. The court noted that some aspects of the dispute were not subject to arbitration, and indicated that “even if it were determined that the dispute was arbitrable, neither the exclusivity rule nor exhaustion concerns would deprive the trial court of jurisdiction.”

While recognizing that the individual right asserted arose under state law rather than federal law, the court concluded “that that does not constitute a distinguishing factor.”

The court held that arbitration was not the exclusive remedy under state law, and explained that the statute at issue in this case plainly was intended to prohibit all retaliatory discharges related to workers’ compensation claims, regardless of the existence of alternative remedies in collective bargaining agreements. The statute is not precluded here by federal policies; a fortiori, then, it is not precluded by any state exclusivity provisions.

This case was not appealed to the Supreme Court, however it established that in the Tenth Circuit, actions based on a state statute sounding in tort may be pursued regardless of whether an arbitration decision has been sought or rendered.

The Ninth Circuit considered similar issues in Garibaldi v. Lucky Food Stores. Garibaldi was covered by a collective bargaining agreement when he was discharged from employment. He filed a grievance which was pursued to arbitration. He lost the arbitration, and subsequently filed a complaint in state court alleging that he was discharged in violation of state public policy because he reported to the local health department that he was instructed by his employer to deliver spoiled milk. The court was called upon to decide two issues: (1) whether a state action for

119. Id. at 1317.
120. Id. at 1320.
121. Id.
122. Id. at 1321.
123. Id. at 1323.
124. Id. at 1324.
125. 726 F.2d 1367 (9th Cir. 1984).
126. Id. at 1368. The basis for his grievance was that he was terminated in violation of the “just cause” provisions of the agreement. See id.
127. Id.
wrongful discharge is preempted by the LMRA; and (2) whether the state claim should be precluded because the employee chose to arbitrate his grievance.128

The court held that the state claim was not preempted, reasoning that

a claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; . . . The remedy is in tort, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public—an interest that transcends the employment relationship.129

In addition, the court held that the arbitration award did not preclude the state tort claim.130 The court quoted from Alexander to support its contention that the source of the right derived from the state public policy exception to the at-will doctrine was independent from the source of the right to arbitrate the dispute.131

The court concluded:

We find the same considerations relevant here as in the preemption context—the state law may protect interests separate from those protected by the NLRA provided the interests do not interfere with the collective bargaining process. Since we find that the state claim is not preempted, we do not find the prior arbitration a barrier.132

Olguin v. Inspiration Consolidated Copper Co.133 is the most recent case involving an organized employee attempting to seek relief in state court for wrongful discharge. Olguin was discharged for disciplinary infractions after seven years of employment.134 He filed a grievance claiming that he was discharged in violation of the “just cause” provisions of the collective bargaining agreement, but the grievance was not taken to arbitration.135 After pursuing administrative remedies,136 he brought suit in state court attempt-
ing to fashion his complaint so as to resist removal to federal court on preemption grounds.\textsuperscript{137}

The court used this opportunity to explain the Garibaldi holding, and dismissed Olguin’s claim as arising “not under state law but under federal labor law.”\textsuperscript{138} The court acknowledged that not “every dispute that can arise out of an employment relationship [can be covered by federal law],”\textsuperscript{139} and the “court must attempt to weigh the state’s interests against those of federal policy,”\textsuperscript{140} but concluded that each of Olguin’s state claims were preempted.\textsuperscript{141} The Garibaldi holding was distinguished on the ground that the claim in that instance arose in connection with the state’s interest in protecting the health of its citizens, and no such state interest was identified by Olguin. In language clearly supportive of collective bargaining the court declared that “the agreement provides the same or greater protection of job security that state tort law seeks to provide for nonunionized employees; accordingly federal law preempts state law.”\textsuperscript{142}

VI. The “Source of the Right” Analysis, the Scope of Collective Bargaining Agreements, and Wrongful Discharge

Federal courts are employing a “source of the right” analysis in potential dual rights cases.\textsuperscript{143} Under this analysis, the initial inquiry is the source of the right claimed. If the source of the right is a federal statute (other than the NLRA), the trend is that courts will not defer to arbitration awards and will permit the individual remedies under: (1) the collective bargaining agreement; (2) the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 (1982); (3) the Taft-Hartley Act; and (4) state law. \textsuperscript{144} 740 F.2d at 1471.

137. 740 F.2d at 1471. The complaint contained four causes of action under state law: (1) wrongful discharge; (2) wrongful discharge in violation of public policy; (3) intentional infliction of emotional distress; and (4) breach of contract. The complaint was based solely on state law. \textit{Id.} at 1471, 1474-76. References to the collective bargaining agreement (which would have placed the dispute within the context of federal labor law) were left out. \textit{Id.} at 1471.

138. See 740 F.2d at 1471. This fact was responsible for the employer’s ability to remove Olguin’s action from the Arizona Superior Court to federal district court under the authority of 28 U.S.C. § 1441(a). See \textit{supra} note 112.

139. 740 F.2d at 1473.

140. \textit{Id.}

141. \textit{Id.} at 1474.

142. \textit{Id.}

143. See \textit{supra} notes 37-110 and accompanying text.
to seek a remedy in federal court.\textsuperscript{144} If the source of the right is the NLRA or the collective bargaining agreement, courts defer to the arbitration award subject to the Board's deferral policy.\textsuperscript{145} If the source of the right is state law, a threshold analysis is undertaken to determine whether the claim is preempted by federal labor law.\textsuperscript{146} State claims that are preempted come within the Board's jurisdiction and its deferral policy. Claims based on state interests outside federal jurisdiction are remanded to state court. Whether the result achieved under the source of the right analysis is consistent with the national labor policy preferring arbitration is subject to debate.

One view is that the policy preferring arbitration places all employment disputes in the organized workplace within the jurisdiction of the arbitrator.\textsuperscript{147} Supplanting arbitration with other adjudicatory forums is seen as weakening the process by calling into doubt the authority of arbitrators and the finality of their decisions. Moreover, private dispute resolution is the explicit preference of the Labor-Management Relations Act.\textsuperscript{148}

An opposing view is that organized employees have other rights that supplement those conferred by the collective bargaining agreement.\textsuperscript{149} No tension is perceived to exist between arbitration and the courts because the supplemental rights are seen as existing outside the scope of the collective bargaining context, thus disputes arising from them naturally should be adjudicated in the courts. Since no tension is recognized, no explanation is given as to why the policy preferring arbitration is subordinated.

This controversy centers around the scope of the collective bargaining agreement in the employment relationship. The flexi-
ble construction often given to collective bargaining agreements suggests that the agreement governs many issues not explicitly enumerated. Still, questions persist regarding whether arbitration may be used when the agreement and public law confer a similar right. Moreover, if the collective agreement does not specifically grant a right conferred by public law, it is questionable whether arbitration may be used.

With much of this controversy still unsettled, courts are now faced with the issue of the scope of the collective bargaining agreement in relation to state wrongful discharge claims. The major problem with applying the source of the right analysis to wrongful discharge claims is that it encourages interpreting the scope of collective bargaining agreements too narrowly. It is relatively easy to view any public law right as separate and distinct from collective bargaining rights, even though the collective bargaining right may have predated the public law one. Once a collective bargaining right is duplicated by the legislature or the courts, it can be seen as a separate public right, thus shifting the adjudication of that right from arbitration to the courts. If the source of the right analysis continues to be employed as it was in Garibaldi, the locus of dispute resolution will shift from private to public as more overlapping rights occur.

Because private collective bargaining rights exist within the broader context of public law, the courts' logic in applying the source of right analysis merely reflects a choice. Courts could recognize that parties to collective bargaining agreements explicitly or implicitly acknowledge public law. Thus, public law issues, especially wrongful discharge, could be adjudicated in the manner agreed to by the parties.150 Claims that may arise under "just

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150. Employee job security is an issue that illustrates the typical dual rights situation. Employees have long been protected from arbitrary discharge through "just cause" provision in collective bargaining agreements. When arbitrators are called upon to decide whether employees have been discharged for just cause, they may take into account the same factors which gave rise to statutes and common law protecting job security. For example, it is an established practice for arbitrators to recognize a health and safety defense to termination for insubordination. F. Elkouri & E. Elkouri, How Arbitration Works 713-24 (4th ed. 1988). If, in a situation like Garibaldi, an employee claimed that he was discharged because he expressed his unwillingness to deliver spoiled milk, it is well within the arbitrator's competence and discretion, based on the agreement to arbitrate and the traditions of the process, to recognize such a defense without explicit reliance on law or public policy. Id. at 714-15. The just cause provision is broad enough to encompass most employer action concerning the termination of individual employees, whether or not the em-
cause" or other contractual provisions should be preempted by the LMRA as a matter of national policy and adjudicated within an arbitral forum. Such a result would support collective bargain-
ing and the policy preferring arbitration.

VII. Conclusion

The Supreme Court once declared that "[t]he collective bar-
gaining agreement covers the whole employment relationship."151 Despite this sweeping pronouncement, courts have found in sev-
eral instances that individual employment rights have a unique identity outside the collective bargaining relationship. The deci-
sions discussed above extend the public interest in providing job security, as well as intrude on a key function of unions—protection of job security through "just cause" provisions in collective bargaining agreements.

This Comment does not suggest that the institution of collec-
tive bargaining has been hurt by these decisions. As suggested above, the number of cases involving dual rights may be very small. However, a concern that emerged originally in Alexander, and is highlighted in Garibaldi, is the extent to which government interests in protecting job security will supplant private mecha-
nisms established for that purpose. Garibaldi intrudes too far into the private collective bargaining relationship by permitting state interests to override private mechanisms that adequately protect job security. With an increasing number of states recognizing ex-
ceptions to employment-at-will,152 and commentators encouraging job security legislation,153 the question of the government's adept-
ness at absorbing workplace tension emerges. The courts were no-
toriously poor administrators of labor relations in the past.154 It is open to argument whether differences in the law, or an enlight-
ened judiciary, would make current courts any better equipped to absorb workplace tension.

Collective bargaining and arbitration have been invaluable

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152. See supra note 1.
tools in the promotion of industrial peace. Courts should encourage their use despite the current dearth of labor militancy which spawned them. Federal courts should recognize the expansive scope of "just cause" provisions in collective bargaining agreements when applying the source of right analysis to wrongful discharge claims. Claims that can be pressed through grievance and arbitration procedures should be preempted. This measure would support collective bargaining and arbitration, and insulate the courts from the point role in promoting industrial peace.

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