

STATE WRONGFUL DISMISSAL LEGISLATION

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ABSTRACT

The uncertainties of common law wrongful dismissal laws have resulted in proposals for comprehensive legislation codifying "just cause" and other protections for employees, culminating in the approval by the commissioners on uniform state laws of a model wrongful termination from employment act. The resulting model act represents a balanced approach to rationalizing a mess. This article briefly reviews the interests involved and sketches a resulting political calculus. It identifies the basic conceptual alternatives for wrongful dismissal legislation and then summarizes the principal features of the new model act. The article concludes that potential constitutional challenges against wrongful dismissal legislation like the model act lack merit.

The uncertainties of common law wrongful dismissal law have resulted in proposals for comprehensive legislation codifying "just cause" [1] and other protections for employees [2-7]. A number of draft wrongful dismissal laws have been considered,¹ although only Montana had adopted such legislation through fall 1991 [9-11].

In August, 1991, the commissioners on uniform state laws approved a model wrongful termination from employment act, culminating a multiyear effort to work out a draft that could codify wrongful dismissal law in a way acceptable to employers, trade unions, civil liberties advocates, and the plaintiffs' bar. The resulting model act represents a balanced approach to rationalizing a mess. It is genuinely in the interests of employers and employees to signify the law of

¹ California, Colorado, Connecticut, Massachusetts, Michigan, Montana, New Jersey, Ohio, Pennsylvania, Virgin Islands, Washington, Wisconsin, and the U.S. Congress [8].

employment terminations, broadening protection to many employees who currently are unprotected against arbitrary, malicious, or public policy-undermining decisions to terminate. Employers and employees both need relief from the fragmented system of legal rights and duties that challenge even the best counsel and judge to figure out substantive relationships among causes of action, preclusion, and preemption issues.

Now the opportunity for reform shifts to the state legislatures. In the legislative arenas, the political forces that began to crystallize in the debates over the model act will focus their energies more intensely. Eventually, even as the model act with or without modifications is enacted, the opportunity will shift to state courts, which undoubtedly will be presented with a variety of constitutional challenges to the model act.

This article briefly reviews the interests involved and sketches a resulting political calculus. It identifies the basic conceptual alternatives for wrongful dismissal legislation and summarizes the principal features of the new model act. The analytical center of gravity of the article is in potential constitutional challenges against wrongful dismissal legislation like the model act. The article concludes that none of the constitutional arguments is meritorious. Many of the arguments presented here have been sketched in preliminary form elsewhere [12, 13]. Greater elaboration of these analytical issues appears in the third edition of the author's *Employee Dismissal Law and Practice*.

POLITICS

Legislative reform of wrongful dismissal law will occur only when the balance of political power favors change [14]. The balance of political power is determined by the intensity of interest group feeling [15-17]. Usually an extended period of active public discussion and debate precedes legislative action, while interest groups develop their positions and move a subject higher on their agendas.² Work on the model act has begun that dialogue.

Six salient interest groups will determine the fate of any proposed wrongful discharge legislation: employers, the defense bar, trade unions, the plaintiff bar, nonunion employees and academic lawyers. Employers usually oppose any legislative or judicial action that would restrict their employment practices or impose increased liability for adverse action against employees. Employers are well-organized politically and influential in legislative assemblies. Anticipated employer opposition is the principal reason wrongful dismissal legislation has moved slowly. But employers also historically have favored legislation as an alternative to common-law liability when legislation improves predictability and

² Agendas express to the relative priority of issues for an interest group, determining how much scarce political capital will be devoted to some issues as opposed to others.

limits the size of damage awards.³ The continued rapid growth in common law liability for wrongful discharge creates an incentive for employers to support the right kind of wrongful dismissal legislation.

The defense bar generally opposes legislative measures that would increase exposure to liability by defendants, but the burden of increased common law liability and the desire for predictability and order through statutory reform creates incentives for this group, like employers, to support reform legislation. Ironically, the three groups who would benefit most from wrongful dismissal legislation are either too poorly organized to effect a change or are ambivalent toward reform.

Trade unions historically have favored legislation granting new rights to employees [18]. Furthermore, the trade union movement is well-organized and influential with legislators [19]. These factors suggest that this group would favor, and that its support could be effective in behalf of, wrongful discharge legislation. Yet, the trade union movement has become increasingly aware in recent years that statutory expansion of employee rights may dilute the incentives for employees to organize. It is well recognized that one of the benefits that union organizers can offer to employees is protection against arbitrary dismissal. Accordingly, trade union groups have been ambivalent toward proposals for wrongful discharge statutes.⁴ On February 20, 1987, however, the AFL-CIO Executive Council issued a "Statement on the Employment-at-Will Doctrine," expressing support for broad just-cause legislation and criticizing proposals for enumerated prohibitions statutes.

The plaintiff bar is ambivalent also. Plaintiff lawyers make their living by litigating, and by receiving portions of large judgments or settlements large enough to compensate them for work done on cases in which the plaintiffs receive nothing—a form of cross-subsidy. This segment of the bar has favored expansion of common-law wrongful dismissal doctrines,⁵ but that does not translate into support of legislation. Most wrongful dismissal legislative proposals, including the model act, limit damages, thus reducing the opportunity for cross-subsidy of plaintiff litigation. On the other hand, to the extent that legislation simplifies litigation or provides for attorney fee awards, it could reduce the need for large

³ An example is the position of major segments of the business community on product liability legislation.

⁴ On July 29, 1983, New York Governor Mario Cuomo vetoed Assembly Bill 6610-B, entitled, "An Act to amend the labor law, in relation to unfair labor practices against an employee who is a licensed professional." The bill would have given a cause of action to a licensed professional employee who was discharged for refusal to engage in conduct that would violate professional ethical standards. One of the reasons cited in the governor's veto message was the uncertain effect of the bill on collectively negotiated grievance mechanisms. It is reasonable to infer that organized labor played a role in this veto by a Democratic governor.

⁵ The Wisconsin Academy of Trial Lawyers appeared as an amicus curiae in *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 835 (Wisc. 1983), urging that recovery be permitted on one or more wrongful discharge theories.

potential damage awards to provide cross-subsidy. Also, if legislation broadens the substantive rights of dismissed employees, it could increase the probability of success for plaintiffs and their lawyers. The self-interest of plaintiff lawyers and their client interests can be helped by reform, but there is an instinctive fear of any curtailment of common-law potential.

Undoubtedly, nonunion employees would benefit most from expanded protection against wrongful discharge. Such protection would enhance their economic security without imposing any identifiable costs directly on them. But this interest group is poorly organized and probably largely ignorant of the legal issues involved. Moreover, there is no "public interest" group that regularly speaks for nonunion employees. The preferences of nonunion employees are unlikely to be influential unless the subject of wrongful dismissal reform gains prominence in election politics, so that the individual votes of members of this group are influenced by candidates' positions on the wrongful discharge issue. The existence of the model act should make the subject more visible, but it is unlikely to dominate the network news or be a major issue in presidential politics any time soon.

One group has strongly supported wrongful dismissal legislation for many years: academic lawyers. Indeed, the common-law wrongful discharge concepts may be attributed in part to the academic legal literature. Academic lawyers are influential because they provide technical assistance to legislators and because they link new proposals to well-accepted legal doctrines, and thus improve the perceived legitimacy of proposals for legislative change.⁶

Interest-group analysis yields this strategy for enacting wrongful dismissal legislation. Employers and the defense bar must prefer legislation to expanded common law liability for wrongful discharge. The plaintiff bar must view proposed legislation as enhancing—or at least not diminishing—the economic feasibility of representing dismissed employees.⁷ Only if these groups decide that legislation is a desirable alternative to continued expansion of common law liability⁸ can legislative action occur.

Employers will be satisfied only by legislation that offers:

1. clear criteria to distinguish legitimate from prohibited dismissals;
2. a means to screen frivolous claims;
3. protection against multiple claims;
4. a cap on damages;

⁶ The influence of law writers on the development of *laissez faire* judicial doctrines is reviewed by C. Jacobs, *Law Writers and the Courts* (1954).

⁷ A group or a political actor may favor a legislative initiative but place much lower priority on action in that area than in others. More intense interest in wrongful discharge legislative action would have the effect of raising its priority, relative to other issues.

⁸ Such benefit could come from simplification of litigation machinery and modification of procedural fairness standards.

5. limited expansion of existing prohibitions (i.e., retention of the employment-at-will doctrine to the extent possible); and
6. deference to voluntarily adopted internal grievance mechanisms.

The preferences of the defense bar parallel those of employers.

The plaintiff bar would like, in its own economic interest:

1. potential for large damage awards;
2. the opportunity to present claims in as many forums as possible, with maximum opportunity for appellate review;
3. statutory award of attorneys' fees.

In addition, the plaintiff bar wants the same things that nonunion employees need:

1. low-cost claim assertion;
2. closest thing possible to just-cause protection;
3. protection of private-off-duty conduct and freedom of speech; and
4. speedy claim resolution

Trade unions are likely to want:

1. increased protection of employees;
2. protection of incentives to unionize; and
3. decreased volume of fair representation claims against unions.

Academic lawyers favor legislation providing:

1. just-cause protection; and
2. providing for arbitration of claims of wrongful dismissal.

The key variables are scope of protection (just cause versus enumerated prohibitions), preemption, damages and attorneys' fees.

The adoption of the model act changes the political calculus in the following ways. First, it crystallizes the legal issues because it permits all sides to focus on one concrete proposal. Second, the bill was developed through an extensive process of consultation with the major affected interests. Its existence and its "legislative history" show the reasoning through which the major interests can find common ground. Third, the bill and its content legitimate "trading off" desires.

WHY LEGISLATION IS NEEDED

Two realities make new wrongful dismissal legislation desirable. The first is the uncertainty confronting common-law courts in developing appropriate criteria for substantive and procedural fairness. The second is the proliferation of remedies for wrongful dismissal involving diverse statutory and common law rights in multiple arbitral, administrative and judicial forums.

The array of rights, duties and privileges and their interrelationships are sufficiently complex that no one—not employees, not employers, not the bar, nor the judiciary—really understands how it all fits together until after a case is fully litigated, perhaps in several different proceedings. This is not a good system to protect employee interests or to promote efficient and adaptable markets for products and labor. Simplification is in everyone's interest.

Legislative Drafting Pitfalls

Several issues must be confronted in drafting a wrongful dismissal statute. It is a mistake, however, for any legislature or interest group to address discrete provisions of a wrongful dismissal statute without considering the interrelationship among the parts. For example, it is difficult to draft language that imposes the burden of proof on the employee claimant to establish wrongful dismissal under a statute that prohibits dismissals except for "just cause." The practical effect of "just cause" protection is to shift the burden of proof to the employer to establish just cause for dismissal. The order of proof articulated by the Supreme Court in *McDonnell Douglas v. Green* [20], and similar formulations utilized under other federal labor statutes, depend for their logic upon a prohibition against a specific motive or type of conduct.

The political trade-off among 1) the scope of the statute, 2) the reasons for which the statute prohibits dismissal, 3) remedies available for violation of the statute, and 4) attorney's fees for plaintiff's counsel, is important. If a new statute limits the amount recoverable, as it surely must to have any hope of attracting employer support, the statute presents a potentially serious threat to the plaintiff bar. This threat can be mitigated and a statute made attractive to the plaintiff bar, if the statute provides for awards of attorney's fees to plaintiffs counsel. Similarly, if the statute preempts other kinds of claims for wrongful dismissal either directly or by requiring a binding election of remedies by a claimant who files under the statute, the potential threat to plaintiff's counsel's contingency fees is greater. Conversely, the attractiveness to employers is greater.

Possible wrongful dismissal statutes lie on a continuum ranging from a simple codification of existing common law theories based on implied contract or public policy tort at the most limited end, to a broad prohibition against dismissals without just cause.

If the statute prohibits dismissal for enumerated prohibitions, comprehensive preemption is difficult to achieve; otherwise an employee dismissed for a "bad" reason not covered by the statute would be remediless unless the statute is amended. Moreover, it is not entirely clear how preemption can be framed to exclude employer conduct ancillary to the discharge that falls within recognized tort categories, such as intentional infliction of emotional distress, defamation, fraudulent misrepresentation, and invasion of privacy. The enumeration of prohibited reasons for dismissal inherently makes the statute more complex. An

enumerated-reasons statute may be difficult to enforce fairly by claimants not represented by counsel. Moreover, it may be difficult to provide an enforcement procedure that is truly speedy. A “just cause” statute has the virtue of simplicity.

Arbitration forums are attractive for the reasons explained later in this article. Yet, drafting a statute that sends wrongful dismissal claims to arbitration presents a number of difficulties. A practical difficulty is deciding where the arbitrators will come from and how they will be certified and assigned. If a new agency must be established to administer an arbitration system, one of the advantages of arbitration as opposed to administrative adjudication may be diluted.

A philosophical difficulty arises from the inapplicability of *stare decisis* in most arbitral systems. One of the ways in which a statute is expected to improve the law of dismissal is by making the law more predictable. Yet, if arbitrators decide claims and do not report their decisions, or if their rules of decision are not reviewable, this sought-for predictability may not be achieved.

A number of constitutional problems also may arise if the statute forces claims presently litigated by the regular courts into arbitration. All but two states have statutes affording the right to jury trial in civil cases. Presumably, a legislature can abolish a cause of action and in creating a replacement cause of action require that this replacement cause of action be litigated in whatever form the legislature deems appropriate. But it is easy to imagine that a wrongful dismissal statute could be drafted initially to abolish tort and contract causes of action for dismissal but might have that abolition stricken from the statute during the legislative process. In such a circumstance, the statute might well be unconstitutional.

POSSIBLE SUBSTANTIVE FAIRNESS STANDARDS

The starting point for writing a wrongful dismissal statute is to select a substantive fairness standard. Formulating a standard for substantive fairness in wrongful dismissal law requires accommodating a number of different interests already afforded legal recognition. The interests of employees to be protected against certain types of unfair and injurious employer action are obvious and are at the core of any wrongful dismissal proposal. Reinforcing these employee interests are societal interests in favor of certain types of conduct by employees. They include interests in the jury system, in the workers' compensation system, in safe products, in free speech, and in privacy. Arrayed against these interests are employer and societal interests in effective management of organizations, which require that employees not be shielded from the consequences of their poor performance or misconduct, and that supervisors not be deterred from exercising their managerial responsibilities by the inconvenience of litigating employees' claims. An employer should be able to justify removing an employee in pursuit of these interests when they outweigh the adverse effect on legitimate employee and public interests.

Even if one accepts these premises, the question remains whether employees should be burdened with justifying employment terminations whenever the terminated employee seeks legal redress. Litigation is expensive. Free enterprise (the preference for regulating economic relations by market forces instead of by law) is a societal value on the employer's side. The free enterprise value militates against requiring employers to prove good cause for all dismissals that the employee chooses to litigate.

A workable substantive fairness standard should reflect this tension and should draw upon the experience of the common law courts and the expressions of the legislature in balancing different interests involved in workplace governance. The balancing required is not new with the emergence of wrongful dismissal tort and contract cases; it occurs in applying substantive due process scrutiny to public employer decisions, and it occurs when an employer is allowed to justify class-based discrimination on bona fide occupational qualification or business necessity grounds recognized in the discrimination statutes.

The use of a balancing process implies criteria for knowing what interests can be taken into account in the balancing. Interests must be recognized as "legitimate" if the law is to take them into account. Defining the scope of "legitimate" interests accomplishes the hardest part of the substantive fairness analysis.

The analytical process involved in such scoping is well known to the common law, reflected in the *prima facie* tort concept, recognized in Section 870 of the Restatement of Torts, the implied covenant of good faith and fair dealing recognized in Section 215 of the Restatement (Second) of Contracts. Essentially the same analytical structure is involved in Constitutional substantive due process and equal protection analysis. In substantive due process analysis, the needs of the state are weighed against the rights of the individual claiming denial of due process [21-23]. The balancing process is not necessary unless the person claiming denial of due process can implicate rights recognized as appropriate for constitutional protection: liberty [24, 25], or property interests [26, 27]. Once either of these rights is shown to be involved, the decision under scrutiny can be sustained only if a "legitimate" state interest in making the scrutinized decision can be shown [28, 29]. The analogy between the property or liberty interest in constitutional analysis and the individual right in substantive fairness analysis is obvious. In equal protection analysis, discrimination must be justified by legitimate state interests with three different levels of scrutiny. Defining and weighing legitimate state interests for substantive due process and equal protection purposes is analogous to the evaluation of employer needs in substantive fairness analysis for wrongful dismissal.

The *prima facie* tort concept provides for the imposition of liability on one who intentionally, without justification, causes legal injury to another [30]. The Restatement drafters contemplated that a court would engage in a balancing process, in which the legal injury to the plaintiff would be weighed against

the legitimate needs of the defendant attempting to “justify” his/her action [30, comment k]. In prima facie tort analysis, as in constitutional due process analysis, legitimacy enters into the equation on both plaintiff’s and defendant’s sides. If the plaintiff has been injured in some way not recognized as legal injury, prima facie tort will afford him/her no damages and no injunction [30, comment e]. Once the plaintiff proves legal injury (and causation, of course), if the defendant cannot offer legally recognized justification, the conduct subjects him/her to liability [30, comment e].

In prima facie tort analysis, the challenger of a decision cannot obtain scrutiny by legal institutions unless s/he can show impairment of an interest formally recognized by the law. The defender can be successful only if s/he shows that the decision was supported by interests formally recognized by the law.

In deciding claims of breach of the implied covenant of good faith and dealing, judges and juries must evaluate the legitimacy of the employee’s claim and the legitimacy interests actuating adverse employer decisions.

The history of employment law in the United States has been the history of adding employee interests to the universe of those legally recognized. Once a new category of interests is recognized, these interests are weighed against legitimate employer interests—either in a statutory formula or in individual cases.

Formulating a standard for substantive fairness in wrongful discharge legislation requires consideration of all of the presently recognized employee interests. A substantive fairness standard also must take into account employer and societal interests in effective management of organizations. These interests require that employees not be shielded from the consequences of their poor performance or misconduct and that supervisors not be deterred from exercising their managerial responsibilities by the inconvenience of litigating employees’ claims. An employer should be allowed to justify removing an employee by invoking these interests when such interests outweigh the adverse effect on legitimate employee interests.

JUST CAUSE V. ENUMERATED PROHIBITIONS

A number of models exist for wrongful dismissal legislation at both the federal and the state level, in addition to models derived from British and Canadian experience [12, secs. 9.12-9.13]. The statutory models fall into two general groups. The first group strongly prevails: statutes enumerating reasons for which dismissal is not permitted. Some of these statutes establish special administrative or arbitral institutions to adjudicate claims of violation; others leave adjudication to the common law courts. The second group contains statutes prohibiting dismissal except for just cause. This approach has been followed in England and Canada [12, secs. 9.12-9.13], and is reflected in the Montana, Puerto Rico and model acts.

Just-Cause Standard

A simple substantive fairness standard prohibits dismissals except for just cause. Such a substantive standard internalizes to the adjudicatory tribunal the balancing of employer and employee interests. It permits requiring more employer justification for dismissals that threaten societal interests or employee expectations induced by employer representations, while requiring correspondingly less justification for dismissals infringing less substantial employee or societal interests.

Imposing a just cause standard, however, can engender opposition on the ground that it would make private employment like public employment. Employees would enjoy something resembling civil service tenure. Such a standard represents a revolutionary change in the law of private sector employment.

Good-Faith Standard

Another simple substantive fairness possibility is a requirement that employer dismissal actions be accomplished in good faith [31]. Good faith is a less burdensome standard for employers than a for-cause requirement. In *Wadeson v. American Family Mutual Insurance Co.*, for example, the court approved a jury instruction on good faith, but rejected the unsuccessful plaintiff's argument that the covenant requires the employer to discharge only for good cause [32]. It reviewed earlier covenant-of-good-faith cases as stopping short of requiring good cause for discharge [32, p. 370]. The employer's action would be allowed to stand based on the subjective nature of the employer's decision, rather than on application of an external standard.

Enumerated Prohibitions

"Enumerated prohibitions" are found in two types of statutes: 1) those enacted with the primary purpose of addressing the employment relationship (labor statutes); and 2) those enacted with the primary purpose of addressing a non-employment problem (e.g., a statute regulating water pollutants). At the federal level, "enumerated prohibitions" statutes appear in both contexts, protecting against adverse employer action based on specific employer conduct or characteristics. Similarly, at the state level, "enumerated prohibitions" statutes can be found in both contexts, but only those with the primary purpose of addressing wrongful dismissal are addressed in this chapter.

Federal statutes limiting employee dismissals are enumerated prohibitions legislation, with two subclassifications: statutes prohibiting dismissals based on membership in specified classes, and statutes prohibiting dismissals for engaging in specified conduct. In both types of statute, employees can show a violation only by showing that the employer made the termination decision based on a reason prohibited by the statute.

With a few exceptions, the federal statutes erect an administrative mechanism to handle claims of violation. Under Title VII [33], and the Age Discrimination in Employment Act [34], claims of violation must be considered initially by a federal or state administrative agency, but the federal agencies only have the power to conciliate. The employee retains the ultimate right to an adjudicatory decision either in federal court or before a state administrative agency with ultimate judicial review. The choice whether to proceed at the state or federal level is the employee's. The statutes protecting employee conduct permit the employee to claim a violation before an administrative agency. The paradigm is the National Labor Relations Act. A number of other statutes require that claims of violation be presented to the secretary of labor. Access to the courts is, for the most part, restricted to judicial review of administrative agency decisions. Generally, litigation before administrative agencies is undertaken at public cost on behalf of the employee.

This approach to substantive fairness incorporates into one wrongful dismissal doctrine the various standard contained in the Constitution and in state and federal statutes, and articulated in common-law cases. In essence, the legislature would codify common-law wrongful dismissal rules. This is what the legislatures have done in part when they have enacted whistleblower statutes. The order and predictability stemming from this consolidation could reduce employer opposition.

The first step in drafting such a statutory standard is to identify those types of employee interests that are entitled to legal protection under existing law. Each of these interests should be incorporated in the new substantive fairness standard.

The interests of employees to be free from discrimination based on race, religion, gender, age, marital status or sexual orientation should be recognized. These interests presently are protected by statute in all or some jurisdictions, and it is unlikely that any credible opposition to including them in a comprehensive wrongful discharge doctrine could be mounted. Interests of employees to be free from discrimination based on specific conduct are also recognized to some extent by statutory law, and also should be protected in conjunction with protections afforded presently under public policy tort concepts. Conceptually, for the employer, it is hard to distinguish from the conduct-based protection afforded by the public policy tort doctrines.

The expectations of employees, generally protected under common-law contract principles, in having employers live up to these promises should also be recognized. Recognition of these contract principles does not greatly involve external reviewers of termination decisions in striking difficult balances among competing interests; the employer itself has struck the balance when it made the promise of employment tenure. If the employer wishes to change the way the balance is struck, it can forbear to make the promise. This part of an enumerated prohibitions statute should address the form of promises that give rise to rights

under the statute, and the consideration issue. ERISA may not be a bad model, statutorily providing for enforcement of employer promises of fringe benefits.

Inclusion of these protections in a new substantive fairness standard would not tilt the balance of interests appreciably against employers. On the contrary, codification would reduce uncertainty and permit responsible employers to design better employee policies and thus from a political standpoint would attract employer support.

Incorporating two other, overlapping, categories of existing common-law protection presents more difficult questions of balance. These categories relate to off-duty conduct and to "liberty" interests protected by the Constitution against governmental interference.

Including termination for off-duty conduct in an enumerated-prohibitions statute has two virtues: it would not jeopardize legitimate employer interests, though it undeniably diminishes employer power, and it would protect certain interests recognized by the Constitution without eviscerating the state-action barrier to full constitutional scrutiny of private employer decisions. Off-duty conduct protection, widely afforded by labor arbitrators, shields employee interests in privacy and personal freedom from employer coercion unrelated to employer economic interests. Unless the employer can sustain the burden of demonstrating a nexus with its business needs, it should not escape liability for terminating employees because of political views expressed outside the workplace, marital status, or sexual orientation. Affording protection to off-duty conduct is not the same thing as imposing a just-cause requirement. Adding off-duty conduct to the enumerated prohibitions for which dismissal is not permitted leaves the burden of proof on the employee to demonstrate that s/he was fired for off-duty conduct. A just-cause protection burdens the employer to articulate the reason for the dismissal and to demonstrate that the reason amounted to just cause. These interests historically were not protected against infringement by private sector employers.

Other constitutionally protected interests also might be included as sources of public policy [35]. These substantive fairness rules might be expressed in a statute like this:

A discharge of an employee shall be wrongful if one or more of the following was a determining factor in the discharge:

- (i) The employee's age, gender, race, religion, national origin, marital status or sexual orientation;
- (ii) The employee's exercise of rights of political expression, religious activities, association or privacy guaranteed under the United States Constitution.
- (iii) The employee's performance of an act or refusal to perform an act, the performance or refusal being in furtherance of public policy, as expressed in statute, administrative regulation, or formal statements of professional ethics applicable to the employee;

(iv) Off-duty conduct of the employee bearing no reasonable relationship to the employee's job performance; or

A discharge of an employee shall be wrongful if the discharge occurred in violation of an employer's express or implied promise that the employer would dismiss the employee only for certain reasons or only after following certain procedures.

None of the suggested enumerated rights would be absolute; employers would escape liability for infringing the rights when they can show legitimate business reasons for doing so. Such justification occurs in applying substantive due process scrutiny to public employer decisions, and when an employer is allowed to justify class-based discrimination on BFOQ or business-necessity grounds recognized in the discrimination statutes. A BFOQ is a "Bona Fide Occupational Qualification" defense to a prima facie case of gender, religious or age discrimination, recognized by § 703(e) of Title VII [36], and by § 623(f) of the Age Discrimination in Employment Act [37].

This is not a revolutionary proposal; virtually all of these grounds for dismissal would give rise to statutory or common-law liability under present law. The political motivation for this approach to substantive fairness is the need to attract support from employers and the defense bar; the needs of the plaintiff bar are addressed primarily through the selections made regarding procedural fairness.

The major weakness of an enumerated prohibitions statute is that it is more difficult to preempt other legal theories for an employment termination.

ERISA Model

The part of an enumerated prohibitions statute recognizing employee expectations induced by the employer promises could define the form of promises under the ERISA model. The statute could require that employers give to their employees an "employment document," similar to the "summary plan description" required under Employment Retirement Income Security Act [38]. Such a document would set out legally enforceable terms of employment. The ERISA concepts could be followed, however, even without requiring such a document.

General Standards Shift Power More

Either a just-cause or a good-faith standard for substantive fairness is general, and therefore gives decision makers outside the workplace the power to make basic value trade-offs.⁹ The acceptability of the substantive standard may depend on who the external decision maker is. If common-law judges make the trade-offs, the appellate process can correct major excursions from rules of decision that

⁹ Professor Unger noted this problem with broad standards [39].

reflect competing societal values. But the price is high in time and money and in the resulting uncertainty before basic standards of conduct can stabilize. If arbitrators make the trade-offs, the resulting transfer of authority over employment decisions is potentially greater. The advantages of arbitration flow in part from its simplicity, and in part from its insulation from subsequent review on the merits of individual cases. This may not be a problem in the collective bargaining context, where union and management negotiators can change or make more definitive the basic document that arbitrators are interpreting. But in the wrongful dismissal setting, the discretion of an arbitrator to give his/her own interpretation to a statutory term such as just cause or good faith is troublesome, because it is difficult to provide a convenient means of channeling the arbitrator's exercise of discretion in specific cases without vitiating the advantages of arbitration. A broad general substantive fairness standard would result in less predictability in employment relations until a body of case precedent is developed under the new system [31].

An enumerated prohibitions approach, being more specific, constrains the role of an external decision maker more than a just-cause, or good-faith standard. Legislatures make threshold interest-balancing decisions [40]. This results in a more complex set of rules, but makes the interest-balancing decisions in advance, in a political arena with employer participation, rather than after the fact, in individual cases by a tribunal second guessing employer decisions.

Why Just-Cause is the Preferable Approach

From a plaintiff perspective, an enumerated prohibitions approach is less desirable than a just-cause approach, simply because an enumerated prohibitions approach affords less protection to employees.

It is less obvious that a just-cause approach may be preferable to employer interests as well. This is so because it is difficult to conjoin broad preemption with an enumerated prohibitions approach. A just-cause bill covers the full range of employee dismissals. Because of this general coverage, it is relatively straightforward to extinguish and preempt all common-law claims for dismissals covered by such legislation. Conversely, under an enumerated prohibitions approach, similar extinction and preemption of all claims for "dismissals covered by this act" preempts only claims for the reasons identified in the act. Dismissals for all other reasons remain covered by the common law. Of course, the preemption can be made broader than the protection in an enumerated prohibitions act. But an approach reflecting such asymmetry between the preemption and the protection is vulnerable on political and constitutional grounds. It is politically vulnerable because it seems to give employers more than it gives employee interests. It is constitutionally vulnerable under the analysis presented in this article because it is more difficult to justify, under substantive due process or rational basis equal

protection, extinguishing common law remedies that have no replacement in the new statute.

For these reasons, this author has changed his position with respect to the most desirable form of wrongful dismissal legislation. In the first and second editions of his *Employee Dismissal Law and Practice* treatise, published in 1984 and 1987, respectively, the author argued in favor of enumerated prohibitions legislation rather than just-cause legislation. Participation with legislative drafting efforts, however, and awareness of the debates associated with the Uniform Act, persuaded the author that it is impracticable to rationalize wrongful dismissal law in an enumerated prohibitions statute, and that the only realistic hope for rationalization arises within a just-cause statute.

PROCEDURAL FAIRNESS

The threshold procedural fairness question is who decides whether a particular termination violated the substantive fairness standard. Whether a wrongful dismissal statute should send claims to arbitration, to an administrative agency, or directly to the regular courts is a procedural fairness question, as is the standard these forums should use in reviewing employer decisions.

Procedural fairness is a relative, rather than an absolute, concept. At minimum, it requires some external check on the decision procedures used by employers, as a counterweight to natural employer interests potentially antagonistic to employee interests. Procedural fairness can be ensured by a review of employer decisions made under procedures used by the employer or it can involve a *de novo* decision by an external tribunal. Determining the appropriate level of procedural fairness, like determining the appropriate approach to substantive fairness, requires a balancing of values.¹⁰

Most of the early proposals for comprehensive wrongful dismissal legislation contemplate some form of arbitration. As the following sections show, however, and as the drafters of the model act discovered, there are major problems in designing a satisfactory statutory arbitration system. The most practical course of action may be to establish administrative procedures, or to send claims to the regular common-law courts.

Preemption, Election, Exhaustion, and Preclusion

One major shortcoming of present employment law is that employers and employees are subjected to multiple litigation in various forums over adverse employment actions. If a particular employee enjoys statutory protection s/he may be able to arbitrate a grievance over his/her discharge, file a charge with the

¹⁰ Acceptance of this proposition is reflected in the balancing approach to procedural due process adopted by the Supreme Court in [41].

NLRB, file a complaint with the EEOC alleging sex, race, and age discrimination, and file a suit alleging wrongful discharge [42-47]. None of these forums can decide claims of right outside the scope of its own narrow jurisdiction. In *Olguin v. Inspiration Consolidated Copper Co.*, the employee filed a state public policy tort action for wrongful dismissal after having administrative claims dismissed under the Mine Safety and Health Act and the National Labor Relations Act. He also filed a grievance under the collective agreement, which the union refused to take to arbitration [48].

All these separate claims may go to a hearing. Enactment of comprehensive protection against wrongful discharge obviates the need for these separate procedures and also creates the opportunity to build political support in the employer community for wrongful discharge legislation by simplifying the machinery for deciding disputes.

Any wrongful discharge statute should force all legal claims related to a discharge into a single proceeding, and should preclude relitigation of the discharge in any other forum. Implementation of this principle is straightforward with respect to other claims under state law. The new statute simply extinguishes the underlying rights that might be asserted, and provides explicitly that decisions under the new statute are entitled to preclusive effect.

Of course this objective is difficult to meet entirely through state legislation. Federal preemption would guarantee employees access to federal forums despite establishment of new state remedies [42, 49]. State legislation could be framed, however, so as to preclude access to the state forum by an employee electing to pursue federal forums. In this situation, the employee would still have access to multiple forums, but it is unlikely that an employee would choose to litigate several narrow federal causes of action to the exclusion of the broad state causes of action for implied-in-fact contract and public policy tort. Thus, protection against multiple claims is established indirectly by abolishing the two causes of action at common law, including them in a comprehensive state statute and disallowing actions under this statute when a federal claim is pursued in a federal forum.

If the employee presents a claim to the new state tribunal, loses and then proceeds to a federal forum, the federal forum might apply judgment- or issue-preclusion principles, through preclusion would be uncertain [50-55]. A new wrongful dismissal statute must unequivocally declare its policy in favor of preclusion, because of the weight the Restatement gives to policy in resolving questions of administrative preclusion [56].

A number of problems arise in connection with defining the appropriate relationship between new wrongful dismissal tribunals and administrative agencies already established to hear issues related to a wrongful dismissal claim. The problem is evident currently when an employee brings a common law public policy tort claim premised on employer violation of health or safety regulations. Health or safety regulations commonly are enforced by administrative agencies. If the agency decides that a health or safety violation did not occur, the question then

arises what effect this should have on the wrongful dismissal case. One can argue that, since the agency did not decide the retaliatory dismissal question, the administrative decision should have no effect. Conversely, one can argue that the public policy basis for the wrongful dismissal claim evaporates when the responsible agency has found that there was nothing wrong with the employer's conduct. The soundest view is that the issue is not whether the employee was *correct* in his/her complaints; rather than the issue should be whether the employee's right to complain *in good faith* without fear of retaliation promotes public policy. Accordingly, a finding of serious violation by the responsible administrative agency would be persuasive evidence that the employee's concern was in good faith. A finding of no violation might support an argument that the employee's complaint was frivolous.

Deference to Employer Procedures

Voluntarism decentralizes decision making, thereby reducing the load on central political institutions. It permits experimentation, provides opportunities for employers and employees directly to participate in making decisions that affect them and usually results in procedures and substantive norms that are tailored to the needs and priorities of a particular enterprise and its employees [57]. A wrongful dismissal statute that promotes voluntarism is more likely to be favored by employers because it allows them to design dispute resolution procedures that accommodate the needs of a particular workplace.

Voluntarism can be promoted by ensuring that substantial deference is paid by legal institutions to procedures adopted by employers for deciding discharge controversies voluntarily. Some state courts have suggested that the external legal machinery should not decide *de novo* whether an employee was discharged wrongfully; rather the inquiry should be whether the employer fairly followed the procedures that the employer itself voluntarily promised to follow [58, 59]. Major impediments to this type of voluntarism exist under present law because of the right to *de novo* trial of most statutory claims even when private arbitration has decided the claim.

Two polar alternatives can be identified. The first alternative, least intrusive into employer prerogatives, but also the least protective of substantive fairness, would be to permit employers to make discharge decisions, immune from any external review, so long as they follow *some* formal process that embodies the rudiments of procedural fairness (e.g., notice, an unbiased decision maker, and an opportunity for the employee to tell his/her side of the story to that decision maker). This is similar to the minimum due process required for student suspensions in *Goss v. Lopez* [60]. In Judge Friendly's list of ingredients of procedural due process, this would include only the first three rights: 1) an unbiased tribunal, 2) notice, and 3) an opportunity to present reasons why the proposed actions should not be taken [61]. The Oregon Supreme Court essentially has embraced this approach in

Simpson v. Western Graphics Corp. [62], though it is not clear that it would impose any procedural requirements, as opposed to deferring to the employer regardless of the procedure followed. An alternative, adopted by the Montana Supreme Court in *Gates v. Life of Montana Ins. Co.* [63], would permit the employer to define the procedures for decision making, but let the jury decide whether the employer had followed them. Professor Summers' proposed statute would apply similar procedural scrutiny to collectively bargained procedures [7, pp. 481, 529]. The other alternative would be more intrusive, but also would enhance substantially the protection afforded to employees. It would involve a trial *de novo* of the fairness of the discharge decision by a jury in a regular court of law, following the usual rules of evidence. Essentially this is the approach adopted by the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield of Michigan* [64]. Obviously even if a jury is to decide the termination question *de novo*, presumptions and burdens of proof materially can affect the relative weight given to employer and employee interests.

An intermediate approach to procedural fairness can be borrowed from administrative law although the administrative law analogy is imperfect. Judicial review of administrative agency decisions proceeds from constitutional due process and legislative delegation doctrines, and is intended to enforce compliance with the agency's statutory mandate. External review of private employer decisions would be premised instead on public principles derived through the common law or expressed in statutes. Under this approach the employer would be allowed to adopt procedures meeting generic requirements of procedural fairness.¹¹ Much more flexibility is permitted under procedural due process constitutional requirements [41, 69, 70]. Employer decisions reached under such procedures¹² would be accepted unless they were arbitrary and capricious or made in "bad faith" [71]. The model would be roughly that afforded by ERISA to plan administrator decisions, which includes greater scrutiny of the procedural fairness of the employer-designed procedures. One of the difficulties with the administrative model is that it tends toward imposition of greater procedural obligations, over time, on the decision maker.¹³

If an employer affords no procedures protective of employee rights, then an external tribunal should decide the merits of a wrongful discharge claim. However, if the employer does have formal procedures within which the grounds for discharge are adjudicated, then the external tribunal should confine itself to an appellate role, ensuring that those procedures were followed. Decisions reached

¹¹The Administrative Procedure Act imposes detailed procedural requirements for adjudication [65].

¹²Whether the employer followed the procedure adopted voluntarily or imposed on it externally is of course a separate question [71].

¹³For example, a requirement that a factual decision be supported by "substantial evidence" [72] implies that a "record" must be generated which, in turn, implies certain procedural requirements [73].

by the employer in compliance with those procedures should be final and binding, unless there is a substantive fairness problem. Substantive issues need not be reached until it is determined that employer procedures were followed.

Despite the desirability of deferring to certain employer decisions, however, a number of difficulties arise. One obvious difficulty is deciding what standards the employer-established procedure must meet in order to be entitled to deferral. Whether procedural fairness existed in the employer's forum cannot be determined by an external decision maker without scrutinizing what the employer did, and what the employee was allowed to say in his/her defense. It is difficult for an external decision maker to ensure procedural fairness without having before it a record of the employer's proceedings or else retrying the case on the merits. But requiring employers to make transcripts or otherwise to create a "record" formalized employer procedures, creating economic and other disincentives for adoption of such procedures.

The underlying premise of a deferential approach to procedural fairness is that the employer's substantive decision to terminate employment will be allowed to stand if the employee has been afforded procedural fairness in the employer's forum. Whether procedural fairness existed in the employer's forum cannot be determined by an external decision maker without scrutinizing what the employer did, and what the employee was allowed to say in his defense. One can imagine factual circumstances in which it is difficult for an external decision maker to ensure procedural fairness without having before it a record of the employer's proceedings or else retrying the case on its merits.

For example, suppose the employer discharged an employee because the employee threatened his supervisor and the employer claims that the decision should not be reviewed on its merits because the employee was afforded procedural fairness in the employer's forum. The employer explains that the employee was given notice that dismissal was contemplated because he threatened his supervisor and was afforded an opportunity to present his version of the facts to the president of the employing enterprise. The president did not believe the employee's presentation and decided that his employment should be terminated.

The employee's version of what happened is somewhat different. The employee alleges that he was given no real opportunity to present his story to the president; that the president gave him only sixty seconds to make his presentation, saying, "Make it quick. This is all a farce, anyway." Under these circumstances, it is difficult for the external decision maker to make a meaningful decision unless s/he hears complete testimony about the decision-making process engaged in by the employer, or unless s/he has a verbatim transcript of proceedings before the employer. Transcripts are available to the external reviewer in administrative law cases and in railroad adjustment board cases—the two analogies offered. But requiring employees to make transcripts significantly reduces employer procedural flexibility, the underlying reason for deference to employer procedures.

A statute can deal with this problem in two ways. First, it can confine the arbitrator to the question of whether the employer procedures were fair before s/he can proceed to address the substantive fairness question. In this first stage, evidence could be offered as to procedures actually followed by the employer. In the hypothetical case offered, the arbitrator could hear testimony and decide whether the employee was given a meaningful opportunity to present his/her version of the facts to the president of the employing enterprise. Only if the arbitrator determines that the procedures followed by the employer were unfair, can the Arbitrator proceed to hear evidence on the merits. This compromise is far from perfect, but it represents a reasonable attempt to defer to employer procedures without rendering the opportunity for external review entirely illusory.

Although deference like this was included in early versions of the model act, it was deleted from the final version. Such an approach could be reconsidered, however. Such an approach provides incentives for employers to continue to adopt their own disciplinary procedures and may reduce employer resistance to new wrongful dismissal legislation. Any other approach creates a disincentive for the continuation or adoption of such procedures because employers always face the threat of relitigation of questions already decided in their own internal procedures.

At the very least, a new statute should ensure the finality of final and binding arbitration agreed to in individual cases or in a class of cases. In those states adopting the Uniform Arbitration Act, or similar structures, little more will be necessary than a savings clause preserving the effect of such statutes. In other states, specific language should be included.

Treatment of Collectively Bargained Arbitration

Employees with a right to be discharged only for cause and to litigate the fairness of terminations within collectively bargained procedures should not gain the right to relitigate such claims in a new external forum.¹⁴ Exclusions of statutory coverage for employees covered by collective agreements is one way to preclude such relitigation.

One of the difficulties with this proposal is that union control over the arbitration process reduces an individual employee's discretion to press a claim as far as possible [75], since the standard of review of collectively bargained decisions is so deferential that it makes meaningful merits review impracticable.

There are signs, moreover, that some unions are willing to support wrongful dismissal legislation only if the legislation gives a choice: the union may submit a dismissal claim to collectively bargained arbitration or the individual employee may submit it under a new statutory procedure. The rationale for this position is

¹⁴Courts hearing common law claims for wrongful dismissal can require that the claims be litigated in collectively bargained arbitration, as a matter of common law [74].

that giving an individual employee access to a forum not controlled by the union probably would lessen the number of subsequent fair representation claims against the union.

SELECTION OF FORUM

A new statute could direct wrongful discharge disputes to any one of three forums: the regular courts, an existing or new administrative agency, or alternative dispute resolution tribunals, such as arbitration. The model act contains optional provisions for each type of forum.

Permitting the regular courts to decide claims would facilitate preclusion of other independent proceedings [50]. This approach also eliminates potential problems with state constitutional rights to jury trial. On the other hand, traditional litigation is expensive and slow. The serious burden on regular courts by the existing volume of civil litigation militates against sending additional wrongful dismissal claims directly to court [76]. A search for civil litigation alternatives enjoys wide support within the legal community and elsewhere. Legislative action perceived as increasing burdens on the courts would contravene the movement to reduce the burden. Additionally, poor plaintiffs depend on the willingness of contingent-fee attorneys to take their cases. Thus, access to the judicial forum frequently depends on attorney availability and attorney evaluation of the case. This presents a barrier to forum access, but also helps to screen claims lacking merit.

Administrative forums traditionally are used in twentieth century labor legislation. This approach provides easier access, is usually quicker than the judicial process, requires no payment by the claimant and benefits from a mature scheme of judicial review. On the other hand, administrative regulation has been subjected to increasing criticism since 1970, and "regulatory reform" has been high on the priorities of the last two presidents of the United States. The earlier experience of the Equal Employment Opportunity Commission (EEOC) shows that a free administrative forum for employment grievances can become completely overwhelmed by the number of cases.

The arbitration alternative is attractive because it avoids these problems with judicial and administrative alternatives. In addition, arbitration already is in wide use to protect against wrongful discharge in the union and government sectors of the economy and has proven to be generally successful in protecting the legitimate rights of both employers and employees. Also, presumably the economic barriers to arbitral resolution are lower for the dismissed employee than the barriers to judicial litigation. A California study estimated that plaintiff legal fees for wrongful dismissal cases that go to trial average \$7500 to \$8000 per case [77]. A typical labor arbitration case probably costs about \$1,000. It is not surprising that many of the concrete proposals for wrongful discharge legislation, and the methods actually adopted in Britain and Canada, utilize some form of arbitration.

Arbitration has a number of disadvantages, however. The civil courts already exist, and referring claims under a new wrongful dismissal statute to the courts has the virtue of avoiding the establishment of a new institution. Moreover, the constitutions of all but one state afford the right to a jury trial for common-law claims. Serious constitutional issues may be raised by a statute that apparently leaves intact common-law tort and contract claims for wrongful dismissal and purports to require that they be heard in a nonjudicial forum. The constitutional problem might be avoided if a new statute expressly extinguishes the common-law claims and substitutes a new statutory claim.

Also, statutory arbitration suffers from disadvantages not present with collectively bargained arbitration. Individual claimants, unlike unions, are largely ignorant as to the qualifications and biases of potential arbitrators. Selection of neutral arbitrators thus may be a problem. Of course, it is possible that the plaintiff bar would develop knowledge about potential arbitrators commensurate with that exercised by unions on behalf of grievants.

The transfer of decision-making authority away from employers is probably greater if arbitration is selected as the forum for reviewing termination decisions. If common-law judges review dismissals, the appellate process can correct major excursions from rules of decision that reflect competing societal values accurately. If arbitrators make the trade-offs, the resulting transfer of authority over employment decisions is potentially greater because most labor arbitration decisions are insulated from meaningful judicial review on the merits of individual cases. This may not be a problem in the collective bargaining context, where union and management negotiators can change or make more definitive the basic document that arbitrators are interpreting. But in the statutory wrongful discharge setting, the discretion of an arbitrator to give his own interpretation to a statutory term such as "cause" or "good faith" is troublesome. It is difficult to provide a convenient means of controlling the arbitrator's exercise of discretion in specific cases without vitiating the advantages of arbitration.

CONSTITUTIONAL ISSUES

A number of constitutional issues arise in connection with state wrongful dismissal statutes: separation of powers, right of trial by jury, equal protection (old substantive due process), and procedural due process.¹⁵ Though the issues of separation of powers and the right of trial by jury are closely related, they can be distinguished in the following manner. Separation of powers concerns the

¹⁵Other constitutional theories may also be involved. See e.g., *Shell v. Metropolitan Life Ins. Co.* [78], which covers statutory application of just cause standard to wrongful discharge actions involving insurance agents who violated federal and state constitutional contracts clauses to extend such standard applied to preexisting employment contracts; and *Eastin v. Broomfield* [79], which held that statutory requirements that the nonprevailing party post bond violated state privileges and immunities clause.

necessity for resolving certain disputes in an Article III court (or a state equivalent), designed to promote fairness and impartiality flowing from the inherent independence of the judiciary. So the focal point of analysis is whether some form of alternative dispute resolution may permissibly supplant the traditional legal forum. The right of trial by jury, however, relates to the protection of the common citizen through judgment by his/her peers. To emphasize the analytical difference, one only need consider that a determination that a matter must be tried in an Article III court does not necessarily mean that the case must be tried in front of a jury. While the two requirements overlap, they are not coextensive.

Identifying the Deprivation

Two elements are necessary to require any constitutional analysis of a state wrongful dismissal statute: 1) the existence of a common-law claim or right before enactment of legislation (constituting a liberty or property interest), and 2) the curtailment of that claim or right by the state statute (constituting “state action”). The existence of a common-law right not only is necessary to establish any constitutionality recognizable deprivation; it also is necessary for coverage by any special state constitutional protection in the relevant jurisdiction (e.g., right to full legal redress, right to speedy justice). If so, evaluation of the claim or right presents an added level of complexity in ascertaining the constitutionality of a given statutory scheme. In general, Constitutional analysis is simplified, and more likely to validate a statute, if the statute fully extinguishes any related preexisting common law claims when substituting a legislatively created right in its place.¹⁶ Such a complete substitution permits considering the appropriate treatment of legislatively created private rights, which the legislature may assign to an appropriate adjudicatory mechanism (though not necessarily an Article III court) without violating constitutional principles of separation of powers, or right of jury trial [80-82]. Procedural due process still is a consideration if the legislatively created right constitutes a liberty or property interest, as it almost certainly would. Equal protection analysis may still be necessary to justify the classifications established by the statutory coverage limitations.

In comparing a state statutory provision intended to extinguish a preexisting common-law claim and replace it with a legislatively created private right, one must carefully examine the extent of each such right. For example, if a statute extinguishes a common law cause of action and replaces it with a statutory right that results in some new limitation on claims, there has been a practical diminution of pre-existing right. In a state that considers the right to legal redress to be a constitutionally protected fundamental right, equal protection analysis may

¹⁶Constitutional analysis is even simpler if the statute simply adds new rights to preexisting common law rights, but this fails to achieve the rationalization and simplification objective urged in this article.

require a showing of a compelling state interest to support the legislative enactment. On the other hand, if the new statutory claim gives more protection to employees (for example, if a state adopts a “just cause” standard where such protection was not previously recognized) than the preexisting common-law claim, then there has been no deprivation (aside from possible reduction in procedural rights giving rise to separation-of-powers arguments). The new added protective sphere of legislatively created rights should not suffer from controversy concerning the constitutionality of the legislature’s ability to regulate in this area.

To simplify consideration of the constitutional issues, assume that the new statute directs wrongful dismissal claims to some form of binding arbitration.¹⁷

SEPARATION OF POWERS

Separation of powers issues concern the interpretation of Article III of the Constitution, which empowers the federal judiciary.¹⁸ The existence of a recognizable claim for legal redress is a necessary element to apply the requirements of Article III, since the jurisdiction of Article III courts is limited to “cases or controversies.”¹⁹ Similar principles (to those used in interpreting the federal Constitution) govern separation-of-powers issues under state constitutions.

Statutory analysis focuses the application of Article III principles on two levels: 1) the personal level of individual rights subject to waiver by the parties [84], and 2) the structural level of interbranch spheres of influence (in this case, specifically the importance of the independence of the judiciary) [84, p. 541] not subject to waiver by parties [85]. A wrongful dismissal statute providing for resolution of the matter through binding arbitration upon mutual agreement by the parties can avoid the first type of separation of powers problem because the voluntary nature of such an agreement would most likely be found to constitute a valid waiver [86, 87]. If the legislature attempts to circumvent the judiciary’s adjudicatory function by terminating an existing form of legal redress in the courts and substituting, for

¹⁷If the state statute incorporates the use of traditional legal forums (state court jury trials) to adjudicate statutory wrongful dismissal claims, constitutional problems associated with alternative dispute resolution methods (especially mandatory binding arbitration) are not reached. In a state where employees have not traditionally enjoyed the right to any legal redress at all for wrongful dismissal claims, the passage of a comprehensive state statute that limits the procedures for claims under new statutory rights could not therefore violate the right of jury trial (where none had previously existed for such a claim) nor the requirements of procedural due process (since no “property” interest existed in the cause of action prior to the state statute).

¹⁸As this section explains, the basic framework for analyzing federal constitutional protections is applied to state constitutional protections, though the standards and the precise constitutional language, may be different for different states.

¹⁹The separation of powers issues under Article III apply only to “cases or controversies” so that to the extent that parties can solve their disagreements voluntarily outside the legal process, separation of powers is not implicated [83].

example, some form of mandatory arbitration not satisfying Article III, then waiver by the private parties cannot save such legislative reallocation of adjudicatory authority.

An important distinction must be made between common-law claims (traditionally recognized at common law) and legislatively created private rights claims (legislatively created by statute). Under the federal and most state constitutions, the former category of claims must preserve the right of trial by jury if they are legal in character.²⁰ Legislatively created private rights, however, do not possess the constitutionally necessary attribute of historical protection, and since the legislature created these rights, they may therefore be resolved in a legislatively determined forum (not necessarily in Article III courts).²¹

Professor Golann of Suffolk University Law School has noted that, in general, alternative dispute resolution methods that pass federal separation of powers requirements will likely satisfy state counterparts [85, 89, 90]. In fact, “state courts have generally upheld binding administrative arbitration” against delegation-of-powers challenges [85, p. 530]. Professor Grodin observed, however, that mandatory arbitration might violate California constitutional clauses pertaining to judicial powers and the right of trial by jury [2, p. 91].

RIGHT OF TRIAL BY JURY

The right of trial by jury under the Seventh Amendment of the federal Constitution applies to claims traditionally brought under the common law.²² Most states have constitutional provisions guaranteeing a right to jury trial [92-96]. Colorado and Louisiana appear to be the only states without a constitutional right of jury trial in civil cases [76, pp. 1221, 1320]. Recent advances in the use of alternative dispute resolution have presented the problem of the substitutability of other adjudicatory methods for traditional jury trials in areas such as workers’ compensation and medical malpractice and under the Federal Magistrate Act [84].

At the federal level, the inquiry involves two analytic steps: 1) a determination whether the statute in question applies to legal claims traditionally recognized at common law, and 2) consideration of the mandatory and binding nature of the outcome of a particular dispute. As mentioned in the separation-of-powers

²⁰A further distinction must be made concerning so-called “core” claims which, though traditionally protected at common-law and therefore within the umbrella of Article III, and claims giving rise only to equitable relief which do not enjoy the right of trial by jury.

²¹The Supreme Court has emphasized that, although Congress may assign the adjudication of a legislatively-created right to a non-Article III adjunct, the “essential attributes” of judicial power must remain in an Article III court [82, pp. 80-81, 88].

²²The Seventh Amendment to the United States Constitution states that: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

section, the cases draw a distinction between common-law claims and claims involving private or public rights created by statute [97] (the former require preservation of the right to trial by jury and the latter may follow alternative adjudicatory models).²³

In the federal courts, to the extent that an individual possesses a personal right to trial by jury for qualified civil claims [98], such a right of trial by jury can be waived upon agreement by the parties.²⁴

To the extent that an alternative dispute resolution method is mandatory in application and binding in effect, extensive restructuring of the existing law is required by the legislature to extinguish fully a common law claim to avoid the constitutional entitlement to jury trial [101]. A statute that allows for ADR upon the voluntary agreement of the parties may be saved by this element of waiver, even if binding in effect [102, 103]. Conversely, a nonbinding mandatory ADR procedure must overcome objections that the process unconstitutionally impairs access to a jury trial [104, 105]. One curative element in drafting a statute with non-binding but mandatory procedures is to ensure that cases may proceed to trial after a maximum period in pretrial ADR [105]. Otherwise, the only solution is to extinguish any preexisting legal right completely, and ensure that the new right is not legal in character, but rather equitable.

EQUAL PROTECTION

The law of equal protection extends the influence of traditional substantive due process requirements to protect against classifications that impermissibly discriminate against individuals similarly situated [106]. Any wrongful dismissal statute that places limitations on claims or plaintiffs necessarily classifies individuals as either protected under the statute or outside the statute's protections. Such a classification must be analyzed to determine whether it discriminates against a protected class of persons or infringes on a fundamental right.²⁵ If the statute does not create impermissible distinctions based on a protected class or in violation of a fundamental right, then rational basis scrutiny is applied to matters of social and economic regulation. Under this standard, so long as a conceivable logical motivation for the legislation exists, the statute survives rational basis equal protection analysis [107]. Although most proposed models of wrongful

²³A second distinction is drawn between common law claims generally and "core" claims, which are at the heart of the policies underlying the Seventh Amendment.

²⁴In such cases the contested issues usually concern the standards by which a valid waiver may be upheld and whether the particular disputed instance meets that standard [86, 99-100].

²⁵It may be somewhat misleading to speak of being "protected" by the statute since potential plaintiffs are usually required to forfeit collateral claims and are subject to limitations on damage recoveries in most proposed wrongful dismissal statutes and thus consider themselves to be in a worse situation than before the statute as a result of such "protection."

dismissal legislation can be drafted to avoid equal protection problems under the federal Constitution, many states may grant more extensive equal protection guarantees under their state constitutions, which may curtail the use of such statutes. The most common scenario involves the express grant of some fundamental right associated with access to a traditional jury trial forum or the preservation of common-law claims against legislative extinguishment [12, § 3.03(4); 108].

Montana is currently the only state that has enacted a comprehensive wrongful dismissal statute. The Montana Supreme Court supported the constitutionality of the Montana Wrongful Discharge from Employment Act in *Meech v. Hillhaven West, Inc.* [109], which held that the act did not violate constitutional protections of the right to full legal redress and equal protection. In *Meech*, the supreme court overruled decisions in *White v. State* [110] and *Pfost v. State* [111], which had found a fundamental constitutional right to a particular existing cause of action, remedy, or redress and held that no fundamental right “to full legal redress” exists under Article II, § 16 of the Montana Constitution.²⁶ Under equal protection rational basis scrutiny, the court found that the act was rationally related to a legitimate state purpose, and the act therefore survived that constitutional challenge.²⁷

In an interesting postscript to the *Meech* decision, in *Allmaras v. Yellowstone Basin Properties* [112], the Montana Supreme Court struck down another challenge to the Montana act and denied standing to plaintiffs asserting privileges and immunities and equal protection claims based on the loss of the preexisting (but extinguished by statute) common-law tort claim of wrongful discharge. The court found that the statutory classifications were identical to those under the common law, and therefore plaintiffs could not claim to be adversely affected by the statute [112].

The best defense against an equal protection challenge is to ensure that all affected parties gain something from the substitution of a legislatively created right for the common-law right, and to ensure that each aspect of the legislative scheme can be defended as serving legitimate state interests.

PROCEDURAL DUE PROCESS

Procedural due process is implicated only to the extent that an employee has a “property” interest in a cause of action for wrongful dismissal. If the employee is terminated under circumstances that could result in liability under state law, the

²⁶The challenged provisions prohibited recovery of non-economic damages and limited recovery of punitive damages.

²⁷LeRoy Schramm, Chief Legal Counsel for the Montana University System, pointed out that the result in *Meech* is peculiarly contingent on a singular change in personnel on the Montana Supreme Court, noting that substitution of McDonough for Morrison on the court switched decision (4-3) in favor of fundamental right to legal redress to decision (4-3) against same right.

resulting chose in action is property, which cannot be taken away without the traditional requirements of notice and opportunity to be heard [113].

One applies procedural due process analysis to legislative replacement of a common law wrongful dismissal cause of action with a statutory right in two steps. First, one applies *Londoner v. City and County of Denver* [114] and *Bi-Metallic Investment Co. v. State Bd. of Equalization of Colo.* [115]²⁸ to the amount of deprivation that occurs when the statute is enacted. This requires defining the amount of deprivation, which in turn requires comparing the value of the new statutory right with the value of old, extinguished common-law right.²⁹ The greater the deprivation, the more procedures must be provided under *Mathews v. Eldridge* [116,117],³⁰ but the maximum procedural process for legislative determinations is relatively low under *Londoner* in any event,³¹ no matter how great the deprivation.

Second, one takes the value of the new statutory right and considers under *Mathews v. Eldridge* the procedural protections against its deprivation later, when an adjudicatory proceeding occurs.³² The greater the value of the right, the more procedures that must be afforded [118]. The less the value, the more summary can be the procedures.³³

²⁸The Court in *Bi-Metallic* stressed that “[w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . There must be a limit to individual argument in such matters if government is to go on.” [115, p. 445].

²⁹In the case where a state statutorily adopts the “good cause” standard contained in the Uniform Employment Termination Act, one may experience difficulty in arguing a greater deprivation under the statutory right. If, however, the state statute places limitations on the forms and amounts of potential statutory recovery, then one may make a colorable argument of greater deprivation under the new regime.

³⁰The Court in *Mathews* distinguished the welfare benefits situation in *Goldberg* from the instant case of social security disability benefits by emphasizing that *Goldberg* involved a greater private interest factor due to the financial need underlying welfare eligibility determinations (as well as differences in the appropriate forms of proof of eligibility in each situation), thus justifying the requirement of a pretermination hearing in *Goldberg* and allowing a posttermination hearing in *Mathews* [116, p. 343].

³¹The Court summarized the necessary procedural process in *Londoner* thusly: “But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.”

³²In *Mathews*, the Court set forth a three-part test for balancing fairness issues in the context of procedural due process adjudicatory requirements, taking into account the following factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail” [116, p. 335].

³³One standard of required procedures for state wrongful dismissal statutes may follow the model presented in *Arnett v. Kennedy*, a Supreme Court case involving termination of a federal employee, which held that dismissal of federal employee for cause required “notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance” as well as posttermination evidentiary hearing [119].

State statutes may encourage the implementation of employers' in-house review processes for wrongful dismissal as a way of screening claims and requiring claimants to assert their claim first through such internal company procedures before being entitled to gain access to statutory ADR or traditional legal forms. The most potentially difficult procedural due process problem involves the use of mandatory binding arbitration.³⁴ Mandatory nonbinding arbitration provisions face possible state constitutional challenges alleging denial of access to the courts to the extent that delays or expenses associated with such ADR methods infringe upon a state constitutional right to judicial redress (or similarly worded right) [120]. A helpful rule of thumb for drafters of state statutes is to consider that binding arbitration mechanisms comporting with federal due process requirements for public benefits (e.g., *Mathews* and *Goldberg*) probably provide satisfactory protection for private disputes regarding employment termination [85]. To attenuate procedural due process concerns in states that mandate strict procedural protections, a wrongful dismissal statute should probably allow for some form of judicial review of the ADR result.³⁵

FUTURE PROSPECTS

The Uniform Act is not, of course, law until it is adopted by individual state legislatures. The most optimistic prospect is that the cooperative and problem-solving spirit that marked the Uniform Act drafting process will serve as a precedent for legislative deliberations and associated lobbying efforts in the states. A more pessimistic prospect is that the legislative debates will be more polarized, with both plaintiff bar and employer representatives rearguing all of the positions they took in the development of the Uniform Act.

Such a scenario would neglect important opportunities. The clear trend in the common law is to limit, or at least to stop the expansion of, common-law rights. Plaintiff interests misperceive this trend or misunderstand current precedent if they believe the common law provides more than a just-cause statute with attorney's fees.

Similarly, employer interests are ill-served by advocacy of the Employment-at-Will Rule in its 1970 form. Basic common-law wrongful-dismissal theories are accepted in virtually every state, and all of the theories, even if they are not expanded further or are limited, present a real prospect of large damage awards in unpredictable circumstances. Few employers can exercise such tight and effective control over all levels of supervision so as to insure themselves absolutely against

³⁴Professor Golann has noted that several states consider mandatory binding arbitration an unconstitutional violation of due process [85, p. 534].

³⁵*De novo* review by a trial court is probably not necessary in most jurisdictions, though variations may exist among the states concerning the appropriateness of either the substantial evidence or clearly erroneous standards [121].

legally enforceable promises arising from personnel procedures and policies or tort claims arising from retaliation against public policy-linked employee conduct. Employers need predictability. Employers also have shown time and again that they can internalize new bodies of employment law and make the legally imposed obligations a routine part of their ongoing business activities. Moreover, most employers respond to the patchwork quilt of employee protection presently on the statute and opinion books with something close to an internally imposed just-cause requirement. If employers thus already suffer the detriments of just-cause protection, they might as well have the benefits of caps on damages and the other procedural trade-offs in the model act.

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