THE NORRIS-LAGUARDIA ACT:

THE LMRA'S OLDER COUSIN

AMERICAN BAR ASSOCIATION

SECTION OF LABOR AND EMPLOYMENT LAW

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STATUTORY HISTORY AND BACKGROUND

The Norris-LaGuardia Act was a speed bump on the road from state to federal regulation of the economy and labor relations. The landmarks along the road include the Sherman Act, the Clayton Act, the Wagner Act, the Taft-Hartley Act and the Landrum-Griffin Act. Each of these laws conferred federal power over segments of the economy. Federal power is commonly exercised either by administrators or by judges. Norris-LaGuardia signaled the beginning of a brief period when federal courts were largely removed from the regulation of union activity.

The early 1930's marked high water in Labor's struggle to freely protest, organize and assemble. The Norris-LaGuardia Act took the weapon of the federal injunction out of the hands of employers. The Wagner Act subsequently created legally enforceable rights for unions and workers. Together these statutes gave workers both a heady feeling of freedom and an unfortunate sense that federalization of their struggle might further their cause. The Taft-Hartley Act of 1947 began to curb Labor's freedoms. By the time the Supreme Court had finally agreed on a construction of the 1947 law, Norris-LaGuardia's goal of reducing federal judicial intervention in labor disputes had given way to an era in which federal courts not only created substantive labor law but resumed its outlawed role of enjoining strikes.

In order to understand the importance of the Norris-LaGuardia Act to organizations of workers it helps to review both the legal status of unions and the mechanisms for regulating collective activity prior to 1932. In 1840 seven Boston bootmakers, including a man named John Hunt struck to compel employers to hire only members of the Journeymen Bootmakers Society. They were arrested and convicted of engaging in a criminal conspiracy in restraint of trade. On appeal the Supreme Judicial Court reversed as neither the means (no worker had not been forced

to withhold his services) nor the end (a closed shop) of the concerted activity were unlawful.[1] The case signaled both the decriminalization of concerted activity and the ascendancy of judges as the arbiters in the looming struggle between labor and capital.

Restraints on trade were disfavored at common law. Generally persons engaged in commerce were free to carry on trade as they saw fit, limited only by statutory law. Agreements not to engage in a particular activity were held to restrain trade.[2] The formation of business trust and cartels that seemed capable of exercising control over production and price became the target of state law.[3] Whether the power was actually exercised was not as important as the fact that these combinations had the power to restrain trade.[4] The theory against collective worker activity was that the workers agreed among themselves (i.e., combined) to restrain trade by picketing the employer.[5]

Another concept bears mention: equity jurisdiction. At common law litigants were remanded to specific legal writs. Unlike today's notice pleading, actions at common law either qualified for relief or they did not. A Chancery Court developed in England which paralleled the law courts and provided equitable relief for parties who did not qualify for relief in the law courts. Because clerics administered the Chancery Courts and because the Church of England was anathema to many who emigrated to America, some states did not welcome equitable relief.[6]

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[1] Commonwealth v. Hunt, 45 Mass. 111 (1842).
[2] Covenants not to compete are common law restraints of trade. See Blake, *Employee Agreements not to Compete,* 73 Harv.L.Rev. 625 (1960).
[3] Andrew I. Gavil, Reconstructing the Jurisdictional Foundation of Antitrust Federalism, 61 Geo. Wash. L. Rev. 657, 658-59 (1993).
[4] Common law restraints of trade extended to acts, contracts, agreements, or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade. 10A Fletcher Cyc. Corp. § 4982 citing Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis 604 (1914).
[5] Commonwealth v. Hunt, supra at 128 ("Stripped then of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this; that the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman").
[6] In Massachusetts for example the Supreme Judicial Court did not acquire full equity jurisdiction until 1857 and then, by statute, only in "cases where there is not a full, adequate and complete remedy at law". St. 1857, c. 214. The

The Constitution conferred both legal and equitable jurisdiction on Article III courts.[7] Federal courts considered the two forms of relief distinct and granted equitable relief only when the legal remedy was not plain adequate and complete.[8]

An early Congressional enactment on the common law restraint of trade was the Sherman Antitrust Act, 15 U.S.C. §1 et seq. Sponsored by an Ohio Senator named John Sherman, the Act was signed into law by Benjamin Harrison in July 1890. Section 1 of the Act expressly addressed restraints on trade by declaring illegal "[e]very contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States". The purpose of the Act is said to protect competition but not competitors.[9] Section 4 of the Act authorized "proceedings in equity to prevent and restrain such violations". 15 U.S.C. §4. Thus the Sherman Act conferred federal question jurisdiction on the federal courts and it conferred equity jurisdiction to restrain violations.[10] The initial use of the injunctive power of the Act involved a small town in Illinois named Pullman.

Pullman, Illinois was a classic company town built in the Hyde Park area of Chicago in 1880. The company owned not only the means of production but also the homes in which the workers lived and the stores in which they shopped. The recession of 1893 resulted in 25% wage cuts for the workers who made Pullman cars, the sleeping cars designed by George Pullman

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Superior Court acquired similar equity jurisdiction in 1883, more than 100 years after ratification of the Massachusetts Constitution. St. 1883, c. 223.

[7] U.S. Const., Art. III § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made").

[8] Smith v. Am. Nat. Bank, 89 F. 832, 839 (8th Cir. 1898) citing Bennett v. Butterworth, 11 How. 669 (1850).

[9] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (purpose is to protect the public from the failure of the market and from conduct which destroys competition).

[10] The Sherman Act provided little guidance as to what were reasonable and unreasonable restraints on trade. The antitrust movement had begun in the states and the federal courts looked to the body of state law to inform their antitrust decisions. See Andrew I. Gavil, Reconstructing the Jurisdictional Foundation of Antitrust Federalism, 61 Geo. Wash. L. Rev. 657, 658-59 (1993); Thomas C. Arthur, Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act, 74 Cal. L. Rev. 263, 283-84 (1986) citing 1 E. Kintner, Federal Antitrust Law 125-242 (1980). Eventually LMRA § 301 would be seen to similarly confer federal jurisdiction to hear cases previously heard either in state court or under a federal court's diversity jurisdiction. Neither the Sherman Act nor § 301 provided much in the way of substance to inform decisions.

sometimes called the Pullman Palace Car for their comparative comfort. While the wages of the Pullman workers were reduced, the rents (deducted from paychecks) were not. The 3,300 employees petitioned the company for relief through a 46 person committee. When relief was denied the Pullman workers struck.

A month later Chicago hosted the national convention of the American Railway Union (ARU), an organization which numbered among its 250,000 members many of the Pullman workers. The female president of the Local ARU affiliate in Pullman appealed to the larger organization for support. The ARU's president Eugene Debs called for a boycott of trains that included Pullman cars. The railroads responded by insuring that trains with Pullman cars also carried the U.S. mail. Richard Olney, a railroad lawyer and President Cleveland's Attorney General directed Justice Department attorneys to secure injunctions against the strikers. The ARU disregarded the injunction and federal troops were dispatched by President Cleveland.[11] Debs and others were arrested and charged with contempt of the injunction. The lower courts had found their authority, in part, in §§1 and 4 of the Sherman Act.[12]

The following year the matter came before the Supreme Court.[13] The Court noted congressional exercise of its interstate commerce power and control of the transportation of the mails. The question was whether congressional enactments criminalizing certain conduct (e.g., obstruction of the mails) permitted the alternative, equitable remedy of injunction. Usually, equity stayed its hand in the face of an adequate legal remedy. As a practical matter however, how could criminal prosecutions provide an adequate legal remedy for the shutdown of the nation's rail system? And what of the right to trial by jury? Don't the defendants have such a

[11] J. Anthony Lucas, *Big Trouble: A Murder in a Small Western Town Sets off a Struggle for the Soul of America* (Simon/Schuster 1998).
[12] See United States v. Debs, 64 F. 724, 746-54 (7 Cir. 1894).
[13] In re Debs, 158 U.S. 564 (1895).

right? Once the Court accepted equity jurisdiction the right to trial by jury vanished.[14] Prosecuting criminal conduct is an executive function while issuing equitable orders is a judicial function. Even though the lower courts had relied on the Sherman Act, the Supreme Court did not.[15] In re Debs authorizes the use of injunctions in labor disputes to abate what were referred to as "public nuisances". The use of broad equitable power to regulate concerted activity of workers, endorsed by the Supreme Court, became common.

To be sure, the Pullman strike was a war on the rails, a violent, destructive and widespread effort to shut down the railroads in order assist the Pullman workers. Our latter day labor disputes pale in comparison. But equally true is the fact that once a remedy has been firmly established as lawful and just, the remedy will be used for less noble ends. What of a two person picket line established to encourage workers not to work for less than a specified wage? The shop owner will complain that by persuading prospective workers not to enter into his employ the pickets are damaging his business. Should the courts enjoin such injury or potential injury? Perhaps more damage would be visited upon the shop owner if a competitor established a similar shop directly across the street. Does it make a difference if the competitor was a combination of persons, a corporation? By the late 1890's it was clear that business combinations were the way of the future. Whatever one person might lawfully do, a combination of persons could lawfully do the same thing. The equitable jurisdiction of the courts did not extend to restraining pure competition by corporations.

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[14] In re Debs, 158 U.S. 564, 595 (1895) ("In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to").

[15] In re Debs, 158 U.S. 564, 600 (1895)("We enter into no examination of the act of July 2, 1890 (26 Stat. 209), upon which the circuit court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed").

Oliver Wendell Holmes[16] addressed these concerns in a case involving a two-person picket line:

> "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . . If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control".[17]

Holmes' view did not carry the day in 1896.[18] The drumbeat for change, unrecognized by most judges, eventually found expression in the Congress. The Clayton Act of 1914 supplemented the Sherman Act by addressing certain anti-competitive practices such as price discrimination and exclusive dealing arrangements. But the Clayton Act also addressed the concern of Labor that the antitrust laws not be used as a justification to outlaw collective action. AFL President Gompers hailed it as "Labor's Magna Carta".[19] The Act, in § 6, accomplished three of Labor's goals: first, it declared that "the labor of a human being is not a commodity"; second, it declared that neither labor organizations nor their members shall "be held or construed

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[16] Holmes served on the U.S. Supreme Court from 1902 until 1932. For the twenty years before his appointment to the Court he sat on the Supreme Judicial Court of Massachusetts. He later would be known as the Great Dissenter for his dissents in cases such as Lochner v. New York, 198 U.S. 45 (1905) and Abrams v. U.S., 250 U.S. 616 (1919). In 1896 however he had not earned that reputation. He prefaced the comments cited with the following: "In a case like the present, it seems to me that, whatever the true result might be, it will be an advantage to sound thinking to have the less popular view of the law stated, and therefore, although when I have been unable to bring my brethren to share my convictions my almost invariable practice is to defer to them in silence, I depart from that practice in this case . . ." Vegelahn v. Gunter, 167 Mass. 92, 108 (1896) (Holmes, J. dissenting).

[17] Vegelahn v. Gunter, supra at 108 (1896) (Holmes, J. dissenting).

[18] The Erdman Act, passed in 1898, called for arbitration of disputes between railroads and unions. It also prohibited a railroad from hiring workers on the condition that they refrain from joining a union. The Court found the latter provision unconstitutional on the ground that the employer enjoyed the constitutional right to contract with whomever he chose. U.S. v. Adair, 208 U.S. 161 (1908). The same year a boycott encouraged by a union in order to pressure a hat manufacturer to hire union workers was held to violate the Sherman Act. Loewe v.Lawlor, 208 U.S. 274 (1908).

[19] P.S. Foner, History of the Labor Movement in the United States, (Int'l Publs. 1991) 371.

to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws".[20] 15 U.S.C. § 17. Finally, in § 20, 29 U.S.C. § 52, the Act specifically directed judges not to issue injunctions in labor disputes.[21]

Labor's euphoria was short-lived. By 1921 the Court had invoked the Clayton Act to sustain an injunction against a boycott by Machinists. Initially the Machinists had struck a Michigan manufacturer of printing presses. Although a few employees left the employ of the manufacturer, the strike was unsuccessful in securing its goals (a union shop, an eight hour day and a union scale of wages).[22] The union expanded the effort by pressuring newspaper companies who purchased the presses and trucking companies who transported them. It was clear that the matter turned on whether the Clayton Act's labor protective provisions immunized the union from the injunction. A majority of the Second Circuit had held that the Act prohibited

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[20] "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticulatural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

[21] "Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application which must be in writing and sworn to by the applicant or by his agent or attorney."

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

[22] There were only four such manufacturers in the country. The Machinists had organized the other three but they complained that they would terminate their agreements unless Duplex was organized as well. 254 U.S. at 480 (Brandeis, dissenting).

the injunction. The Supreme Court reversed.[23] The Court found that § 6 protected combinations of workers but only when they engaged in *lawful* conduct.[24] The error of the Circuit Court majority came from their reading of § 20. The Act directed that no injunction be issued in a case between an "employer and employees". The Second Circuit majority had included the 60,000 members of the Machinists Union in the class of persons protected. The Court "deem[ed] this construction altogether inadmissible".[25] The Court was not about to countenance a construction that either legalized a secondary boycott or permitted one to go unrestrained. After all, the conduct was a combination in restraint of trade. The fact that Congress had specifically instructed the Court not to apply restraint of trade doctrines to union activity did not deter the Court.

The Duplex dissenters, Justices Brandeis, Holmes and Clarke disagreed. They contended that economic self-interest justified the strike. Duplex, by remaining open shop, threatened the gains and the jobs of Machinists working at Duplex' competitors. That the other Machinists made common cause with the striking Duplex workers was evidence of their self-interest. The limits of acceptable conduct in defense of economic self-interest were for Congress, not the Court, to declare.[26] Congress eventually adopted the view of the Duplex dissenters when, in the

[23] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
[24] The Court did not pause to consider the question of whether it or Congress determined whether conduct was lawful. Duplex supra at 469 ("But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws").
[25] 254 U.S. at 471.
[26] 254 U.S. at 488 (Brandeis dissenting) ("But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat").

1930's, it enacted labor legislation which, with the Clayton Act, forms what courts have referred to as labor's "statutory exemption" from the antitrust laws.[27]

The Depression of 1929 produced all manner of change in the United States. High unemployment gave rise to organizing drives and the formation of the Congress of Industrial Organizations (CIO) to organize workers in the basic industries. Even before Franklin Roosevelt took office and ushered in the New Deal, the power of judges to place their thumbs on the scales during labor disputes was legislatively addressed. The Norris-LaGuardia Act, sponsored by two progressive Republicans[28] and signed into law by President Hoover, accomplished the goal of removing federal courts from the business of issuing labor injunctions.

THE STATUTE: ITS PURPOSE AND ITS LANGUAGE

Norris-LaGuardia speaks in jurisdictional terms, broadly and definitively. Section 1 denies jurisdiction to federal courts to enter injunctions "except in a strict conformity with the provisions of this chapter" and it prohibits injunctions "contrary to the public policy declared in this chapter." 29 USC § 101. The prime purpose of the Act was to restrict federal equity power in labor disputes within greatly narrower limits than it had come to occupy.[29] One might question whether a Legislative enactment that circumscribes the equity power of the Judiciary can pass Constitutional muster particularly when the Courts have the last word on Constitutional questions. The question was answered decisively: "there can be no question of the power of

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[27] See Brown v. NFL, 518 U.S. 231, 236 (1996). The statutory exemption protects unions from antitrust exposure when they act alone, in their own self-interest. H. A. Artists & Associates, Inc. v. Actors' Eq. Ass'n, 451 U.S. 704, 714-15 (1981) citing United States v. Hutcheson, 312 U.S. 219 (1941). The non-statutory exemption, on the other hand, protects both unions and employers from antitrust liability even though they enter into anti-competitive agreements. H. A. Artists & Associates, Inc. v. Actors' Eq. Ass'n, 451 U.S. 704, 714-15 (1981).

[28] Senator George Norris of Nebraska was an advocate for farmers and workers voted who against the declaration of war against Germany in 1917. Representative Fiorello LaGuardia of New York represented East Harlem from 1922 to 1933 and later served as Mayor of New York City from 1934 until 1945.

[29] Brotherhood of Railroad Trainmen, Lodge 27 v. Toledo, P & W RR, 321 U.S. 50, 58 (1944).

Congress thus to define and limit the jurisdiction of the inferior courts of the United States."[30] Although the Supreme Court enjoys Constitutional consanguinity with the Legislature, the inferior federal courts do not.[31]

Section 2 declares the policy of the United States to be that "the individual unorganized worker . . . have full freedom of association, self organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents." While the Act does not create legally enforceable rights it states a policy of the United States that the exercise of certain rights be freed from both employer and judicial restraint. In a few more years the world would be introduced to the Wagner Act's Section 7 rights. For the time being, Congress adopted a policy of supporting the freedom to organize.

Prior to the 1930's freedom of contract reigned.[32] An employer had been able to extract from an employee an enforceable promise that the employee would not join a labor organization as a condition of employment. Such undertakings earned the name "yellow dog contracts". If the policy of the United States, as announced in Section 2, was to permit an individual unorganized worker to have full freedom of association it became necessary for Congress to restrict the freedom of an employer to condition employment on such a promise. Section 3 of the

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[30] Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

[31] Kline v. Burke Construction Company, 260 US 226, 234 (1922) ("Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other [federal] court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not expended beyond the boundaries fixed by the Constitution").

[32] See Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987). The freedom of contract doctrine sustained individual employment agreements in the face of state laws limiting hours of work. Lochner v. New York, 198 U.S. 45, 49 (1905) invalidated a New York law limiting the hours of bakery workers to 60 per week and 10 per day. But see Muller v.Oregon, 208 U.S. 412 (1908) (Oregon law limiting females to 10 hours per day sustained). The reasoning of the Muller Court, 208 U.S. at 421 speaks volumes: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race".

Norris-LaGuardia Act did that. The Act declared that any such promise "shall not be enforceable in any court of the United States and shall not afford any basis for the granting legal or equitable relief by any such court." The statute extended both to promises not to join a union and to withdraw from employment if the employee does join a union. 29 USC §103.

Section 4 of the Act identifies nine specific acts that courts simply could not enjoin whether they were done by individuals or in concert. These included striking, joining a union, assisting someone who is striking, publicizing the facts of a labor dispute, assembling peaceably in the promotion of self-interest, advising anyone of an intention to do any of these acts, agreeing with someone else to do or not do any of these acts and advising urging or inducing someone else to engage in these acts. When read in conjunction with Section 7 of the Act Section 4 declares that the specified conduct does not amount to unlawful acts. Picketing is protected from injunctions under section 4 even if otherwise "tortious under state or federal law".[33] The object of the conduct specified under section 4 is irrelevant.[34] The conduct is not to be enjoined.

Section 5 of the Act addresses the pernicious question of conspiracy by depriving federal courts of the jurisdiction to issue an injunction on the ground that persons collectively engaging in acts described in Section 4 are engaged in an unlawful combination or conspiracy. That a Sherman Act violation was charged no longer provided a warrant for injunctive relief.[35]

Section 6 of the Act requires "clear proof of actual participation in, or actual authorization of unlawful acts before an officer, member or an organization itself is held responsible for those acts." Section 6 essentially eliminates vicarious liability without evidence

[33] Marine Cooks and Stewards, AFL v. Panama S.S. Co., 362 U.S. 365, 372 (1960)
[34] Wilson & Co. v. Birl, 27 F. Supp. 915, 917 (E.D. Pa. 1939) ("The law makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object").
[35] Milk Wagon Drivers, Local 753 v. Lake Valley Farm Products, 311 U.S. 91, 103 (1940).

that the agent's conduct was the authorized act of the principal.[36] Liability does not accrue to an international union that intervenes to quell local disturbances without the "clear proof" called for by section 6.[37]

Section 7 of the Act provides either a road map for an injunction or protection from injunctions in labor disputes. Section 7 requires certain procedures: a complaint made under oath, testimony of witnesses under oath and in open court and the opportunity for cross-examination and testimony in opposition. Section 7 also requires specific findings of fact by the court: a) that unlawful acts have been threatened and will be committed unless restrained,[38] b) that irreparable injury to property will follow,[39] c) that greater injury will be inflicted on the plaintiff by denying the relief than upon the defendants by granting it, d) that plaintiff has no adequate remedy at law and e) that the public officers charged with the duty to protect the complainant's property are unwilling or unable to furnish it. 29 U.S.C. § 107(a)-(e).

The public officer[40] provision, 29 U.S.C. § 107(e), is designed to reinforce the proposition that unlawful acts alone are not enough to warrant injunctive relief.[41] The House

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[36] United Broth. of Carpenters & Joiners of Am. v. U.S., 330 U.S. 395, 403 (1947) ("We need not determine whether s 6 should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or member, charged with responsibility for the offense, actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration").

[37] Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[38] It bears mention that the law of the state provided the substantive rights of the parties. Thus, whether the acts complained of were unlawful was, in the 1930's, a question of state law. Lauf v. E.G. Shinner & Co., 303 U.S. 323, 327 (1938) ("As the acts complained of occurred in Wisconsin, the law of that state governs the substantive rights of the parties").

[39] See East St. Louis Laborers, Local 100 v. Bellon Wrecking & Salvage, 414 F.3d 700 (7 Cir. 2005); Local Lodge 1266, IAM v. Panoramic Corp., 668 F.2d 276 (7 Cir. 1981); AT&T Broadband, LLC v. IBEW, 317 F.3d 758 (7 Cir. 2003); Aluminum Workers v. Consolidated Aluminum, 696 F.2d 437 (6 Cir. 1982).

[40] Public officers are state, county and city law enforcement officers. Cupples Co. v. AFL, 20 F.Supp. 894 (E.D.Mo 1937).

[41] Carter v. Herrin Motor Freight Lines, 131 F.2d 557, 561 (5th Cir. 1942) ("This provision of the statute . . . was not written in the act as a merely perfunctory gesture, it may not be perfunctorily complied with. It expresses the legislative conviction that acts of violence and breaches . . . ought not to be relieved against by injunction unless the

Judiciary Committee considered that unlawful acts should be addressed by local, not federal courts.[42] "One part of the purpose of Congress in adopting the Norris-LaGuardia Act undoubtedly was to leave in the hands of state and local authorities those problems of public order which they were capable of handling".[43] An indication of the central role of local police in the injunction calculus is provided by § 7's requirement that "due and personal notice" of the hearing be provided to "to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property".[44] The complaint must allege and the complainant must prove this element.[45] Mass picketing without more does not warrant injunctive relief.[46]

Section 8 of the Act requires the complainant to make "every reasonable effort to settle such dispute either by negotiation or with the aid of any governmental machinery of mediation or voluntary arbitration." This provision applies to disputants subject to the Railway Labor Act.[47] The policy behind the RLA to encourage voluntary adjustment of disputes accords with the

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local authorities whose duty it is to keep the peace have first been resorted to, and have either advised that they could not or would not keep it or advising that they could and would, have failed through inability or unwillingness to do so. It is, therefore, of the very essence of the right to apply for injunctive relief in a federal court that the statutory allegation be made and definitely proven").

[42] H.R.Rep. No. 669, 72d Cong., 1st Sess., 9 (1932) ("The last provision is considered desirable, because it often happens that complainants rush into a Federal court and obtain an injunction the enforcement of which requires the court to consider and punish acts which are and ought to be, under our system of government, cognizable in the local tribunals. Our Federal courts already are congested with cases ordinarily cognizable in the local police courts").

[43] Cimarron Coal Corp. v. Dist. No. 23, United Mine Workers of Am., 416 F.2d 844, 847 (6th Cir. 1969).

[44] Notifying the sheriff and the chief of police of the hearing without calling them as witnesses left the trial judge without a basis for evaluating their willingness or ability to protect plaintiff's property. Donnelly Garment Co. v. Dubinsky, 154 F.2d 38, 42 (8 Cir. 1946). But see Cater Const. Co. v. Nischwitz, 111 F.2d 971, 977 (7 Cir. 1940) (undermanned law enforcement unable and unwilling to protect plaintiff; "adequate protection would have required a large number of deputies").

[45] Gaslight Enterprises v. Carpenters, Local 599, 759 F.Supp. 465 (N.D. Ind. 1990).

[46] See Heintz Mfg. Co. v. UAW, Local 515, 20 F. Supp. 116 (E.D. Pa 1937) (between 200 and 250 pickets hurled opprobrious epithets and insults; police details varied from 15 to 60; no defiance of police and persons seeking access to plant; judge concluded "So far as I can see, the police are in entire control of the situation and order is being maintained"); Cimarron Coal Corp. v.UMW, Dist. No. 23, 416 F.2d 844 (6 Cir. 1969) (mass picketing does not equate to violence; fact that two cars were turned away when police were present does not establish either inability or unwillingness).

[47] Brotherhood of Railroad Trainmen, Lodge 27 v. Toledo, P & W RR, 321 U.S. 50 (1944) (Plaintiff's refusal to agree to voluntary arbitration under the RLA deprived the court of jurisdiction to enjoin the strike).

policy of Norris-LaGuardia to relegate injunctions to a last resort. Section 9 of the Act requires that findings of fact be made and "filed by the court" prior to the issuance of a restraining order or an injunction. The injunction may only include a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint. Section 10 of the Act provides that temporary injunctions may be certified to the Court of Appeals for review.

Section 13 of the Act includes a broad definition of the term "labor dispute" and of the term "persons participating or interested" therein. The term "labor dispute" has consistently been given the broad construction that its language suggests,[48] although not without protest.[49] When the Government took over the operation of the coal mines (and stood in the shoes of the employers) however, a mine worker strike was enjoined on the dubious ground that the sovereign (at whose behest the suit was filed) was not a person participating in a labor dispute.[50]

The recent and celebrated NFL lockout of football players provided an occasion to apply the Norris-LaGuardia principles. The district court enjoined the lockout concluding that the players, having turned their backs on the labor management framework by decertifying their union, removed the dispute from the scope of a "labor dispute.[51] The circuit panel disagreed holding both that the controversy between the players and the NFL constituted a labor dispute

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[48] Or. of R. R. Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330, 335 (1960) ("Congress made the definition broad because it wanted it to be broad"); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); American Federation of Musicians v. Carroll, 391 U.S. 99 (1968); Jacksonville Bulk Terminals v. International Longshoremen's Ass'n, 457 U.S. 702 (1982).

[49] Justice McReynolds dissented from New Negro Alliance's holding that a demand to hire negro workers, supported by picketing constituted a labor dispute: "It seems unbelievable that . . . Congress intended to inhibit courts from extending protection long guaranteed by law and thus, in effect, encourage mobbish interference with the individual's liberty of action. Under the tortured meaning now attributed to the words 'labor dispute,' no employer-merchant, manufacturer, builder, cobbler, housekeeper or whatnot-who prefers helpers of one color or class can find adequate safeguard against intolerable violations of his freedom if members of some other class, religion, race, or color demand that he give them precedence". New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 563-64 (1938) (McReynolds, J. dissenting).

[50] U.S. v. United Mine Workers, 330 U.S. 258 (1947).

[51] Brady v. NFL, 2011 WL 1535240 (D. Minn. 2011) vacated 644 F.3d 661 (8 Cir. 2011).

and that injunctions against employer conduct are as prohibited as injunctions against labor conduct.[52]

Norris-LaGuardia preceded the Wagner Act by 3 years and the Taft-Harley Act by 15 years. Not surprisingly, the high water mark for union organization occurred during these years when more than 30% of private sector workers were represented for bargaining.[53] Since World War II labor relations has been heavily regulated. Market forces, at work in the 1930's and 1940's when both primary and secondary activity was unrestrained, gave way to government regulation. The other change that emerged from the post-war legislation was the primacy of federal law over local law in the enforcement of collective bargaining agreements.

POST-TAFT-HARTLEY: SECTION 301 AND BOYS MARKETS

Section 301[54] of the Labor Management Relations Act addressed the jurisdictional problem that federal courts could hear suits for violations of collective bargaining agreements

[52] Brady v. NFL, 644 F.3d 661 (8 Cir. 2011) disagreeing with de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.1970); Local 2750, Lumber & Sawmill Workers Union v. Cole, 663 F.2d 983 (9th Cir.1981). The author considers it self-evident that judges are able to apply Norris-LaGuardia literally with less hesitation when the hand sought to have stayed is management's than when it is labor's.

[53] Mayer, *Union Membership Trends in the United States* (2004) Federal Publications. Paper 174. http://digitalcommons.ilr.cornell.edu/key_workplace/174

[54] Sec. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, 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.
(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act [chapter] shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.
(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.
(e) For the purposes of this section, in determining whether any person is acting as an ``agent'' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. 29 U.S.C. § 185.

only if the litigants could establish both diversity of citizenship and the requisite jurisdictional amount.[55] Section 301 clearly conferred jurisdiction on federal courts to hear breach of contract cases without respect to the amount in controversy or diversity of citizenship. Prior to § 301 state courts heard breach of contract cases. Federal courts heard them only if diversity provided federal jurisdiction. Congress clearly intended to open the federal courthouse doors to suits over labor contracts. No longer did the individual members need to be served (as some states had required). Unions could be sued as entities, like corporations. Judgments were enforceable against union assets, not individual assets.[56] What substantive law governed suits for breach of collective bargaining agreements? Traditionally state law governed. The answer to that question was not plainly stated by Congress.

The Court struggled with the question before eventually concluding 1) that federal law (uninformed by any substantive norms) governed and 2) that arbitrators, not judges, supplied the interstitial content for inherently ambiguous collective bargaining agreements. The path to these outcomes was circuitous.

One of the important first steps on the path was taken by a federal judge in Massachusetts. In 1953, Judge Wyzanski held that §301 authorizes specific performance of arbitration agreements even thought the Federal Arbitration Act excludes "contracts of employment". He reviewed the options: 1) whether §301 confers on federal courts the obligation to formulate a federal common law in connection with the rights and remedies of parties to collective bargaining agreements or 2) whether §301 contemplates that federal law governs procedures while state law governs substance and some combination governs remedies. Option 1

[55] See Robert E. Schaberg, *Labor Law – Norris-LaGuardia Act – Arbitration Agreements- Federal Courts May Enjoin Strikes in Breach of No-Strike Agreements-Boys Markets v. Retail Clerks Union, Local 770,* 12 B.C.L.Rev. 295 (1970), http://lawdigitalcommons.bc.edu/vol12/iss2/7.
[56] See Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 449 (1955).

causes problems because it extends the reach of federal law and either requires state courts to apply federal law or it would permit two conflicting sets of laws. Option 2 might leave federal labor policy at the mercy of obsolete local laws. Judge Wyzanski finessed the issue as Massachusetts law and federal law were, in his view, in accord regarding specific enforcement of arbitration agreements. He thus granted the order to arbitrate the dispute.[57]

Justice Frankfurter had authored the definitive work on federal court injunctions shortly before the passage of Norris-LaGuardia.[58] The thrust of the Act was to reduce the role of federal courts in the superintendence of labor disputes. Justice Frankfurter did not support the expanded role for federal courts that Judge Wyzanski's opinion favored.

In 1955, in a case involving claims for wages under a collective bargaining agreement Justice Frankfurter commanded enough votes to limit § 301's reach. The Court remanded to state court a union's claims for unpaid wages on the theory that the individual employees could recover as common-law breach of contract plaintiffs under state law.[59] The union's federal suit to recover the wages for the members raised troubling constitutional questions. Federal courts were simply not ready for this responsibility.[60] Justice Frankfurter won this battle but eventually lost the war. In due course, individual workers were recognized as proper § 301 plaintiffs for the

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[57] Textile Workers v. American Thread, 113 F. Supp. 137 (D. Mass. 1953).
[58] Frankfurter and Greene, *The Labor Injunction* (1930).
[59] Association of Westinghouse Salaried Employees, 348 U.S. at 459-60. Five justices joined Justice Frankfurter in holding that the employees' right to be paid the wages for which the union had bargained were "uniquely personal", "peculiar in the individual benefit" conferred and "arising from separate hiring contracts". As the employee could recover in state court and as Congress had not clearly designated the union his collection agent, the federal court lacked jurisdiction over the union's breach of contract action. Justice Frankfurter also raised the spectre of constitutional problems that might arise from the federalization of collective bargaining agreements. Justices Douglas and Black would have permitted the union to sue to enforce the wage claims. 348 U.S. 437, 465-66 ("We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the construction and enforcement of the collective bargaining agreement").
[60] 348 U.S. at 456. ("To turn s 301 into an agency for working out a viable theory of the nature of a collective bargaining agreement smacks of unreality. Nor does it seem reasonable to view that section as a delivery into the discretionary hands of the federal judiciary, finally of this Court, of such an important, complicated and subtle field").

enforcement of collectively bargained promises as a matter of federal law.[61] More importantly, unions themselves could sue on behalf of their members. Enforcement of the fundamental bargain between unions and employers (arbitration of grievances in exchange for no-strike promises) became a matter of federal law.

The Textile Workers sought specific performance of an arbitration promise in the case that forever altered the landscape.[62] The grievances concerned workloads and work assignments with some claims for back pay. The Court sustained federal jurisdiction to order specific performance of an arbitration promise.[63] Norris-LaGuardia, after all, did not include in section 4's list of proscribed orders, an order to compel arbitration. Moreover, section 8 of Norris-LaGuardia expressed a policy preference for voluntary resolution. As a policy matter, encouraging labor arbitration trumped the policy of staying the equitable hand of the federal courts. Justice Frankfurter, alone, dissented.[64] By 1957 the primacy of federal law over the enforcement of collective bargaining agreements had been finally established and federal equitable jurisdiction had been tentatively reclaimed at least insofar as enforcing the arbitration promise.[65]

A word about arbitration. Labor arbitration is perhaps the paramount contribution of American labor law to dispute resolution. Unions and employers resolve their differences

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[61] Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962).
[62] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
[63] 353 U.S. at 458-59.
[64] Because Justice Frankfurter had an important role in the passage of Norris-LaGuardia, see note 53, supra, and because I enjoy the fact that he responded to Justice Douglas' "mountain out of molehills" dissent in the Westinghouse case, note 59, *supra*, I set out a portion of his dissent:

> "The Court, however, sees no problem of 'judicial power' in casting upon the federal courts, with no guides except 'judicial inventiveness,' the task of applying a whole industrial code that is as yet in the bosom of the judiciary. There are severe limits on 'judicial inventiveness' even for the most imaginative judges. The law is not a 'brooding omnipresence in the sky,'. . . and it cannot be drawn from there like nitrogen from the air. But the Court makes s 301 a mountain instead of a molehill and, by giving an example of 'judicial inventiveness,' it thereby solves all the constitutional problems that would otherwise have to be faced". 353 U.S. 448, 465 (1957).

[65] Landrum-Griffin, two years later, constituted a Congressional endorsement of federal control of the activities of labor organizations.

through arbitration as a way of maintaining their long-term relationship. As a matter of policy Congress has never explicitly stated a national policy favoring arbitration in the same way that, in section 2 of Norris-LaGuardia, Congress stated the policy supporting jurisdictional limitations on the courts.

At common law private parties could agree to submit their disputes to a private arbitrator. If they so agreed and the arbitrator rendered a decision (an "award") the courts would enforce the award as the product of the parties' agreement. The court did not generally review the award for its correctness because, after all, the parties had agreed that the award was to be final and binding on both parties.

A problem arose when one of the parties to the arbitration promise refused to submit the dispute to the arbitrator. Courts would not specifically enforce the promise to arbitrate the dispute because, without the consent of one of the parties, the jurisdiction of the arbitrator was lacking. The other reason was that courts, for hundreds of years, had determined liability under contracts and judges considered judicial resolution of contract disputes to be the preferred method of resolution. It has been said that the need for a statute enforcing arbitration agreements "arises from ... the jealousy of the English courts for their own jurisdiction".[66] The refusal of judges to specifically enforce arbitration promises required legislative action.

In 1920 the New York legislature passed the New York Arbitration Act. This law gave New York courts the authority to specifically enforce the agreement to arbitrate a particular dispute even if one of the parties to the agreement was no longer willing to arbitrate.[67]

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[66] See Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) citing the House Report of the United States Arbitration Act, H.R. Rep. No. 96 (1924).

[67] Berkovitz v. Arbib & Houlberg, 230 N.Y. 261, 269 (N.Y. 1921) ("Section 2 of the statute [L. 1920, c. 275; Consol. Laws, c. 72] declares a new public policy, and abrogates an ancient rule. 'A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the Code of Civil

In 1922 a dispute between a ship owner and a charterer came before the courts of New York. The New York Court of Appeals held that 1) because maritime suits and suits in admiralty were specifically within the jurisdiction of federal (not state) courts under Article III of the Constitution and 2) because federal law conferred exclusive jurisdiction over admiralty and maritime cases on the federal district courts, the courts of New York could not enforce the arbitration agreement. The Supreme Court of the United States reversed.[68] Even though the New York statute was broad enough to cover maritime contracts the New York courts had viewed the Constitutional provision as creating an exception to state court jurisdiction over maritime contract disputes. The Supreme Court viewed the enforcement of the arbitration promise as a remedial measure that was within the province of the state and not an interference with the substantive rights of the maritime contract. The state statute was merely procedural, not affecting the substantive rights of the parties. Even though a federal admiralty court did not have the power to grant specific performance of a maritime contract's arbitration promise, the state of New York could lawfully provide such a remedy.

In 1925 Congress passed the United States Arbitration Act (USAA). 9 U.S.C. § 1 et seq. This statute made written arbitration agreements enforceable when contained in a "maritime transaction or a contract evidencing a transaction involving commerce". It is not difficult to view the USAA as a response to the anomalous result reached in Red Cross Line. Thus, after the passage of this law specific performance of arbitration promises in maritime contracts would be equally available in federal admiralty courts as in the state courts of New York.

Procedure, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract' Arbitration Law, § 2").
See Cohen, *The Law of Commercial Arbitration and the New York State Statute*, 31 Yale L.R. 147 (1921).

[68] Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).

Whether the USAA applied to labor contracts was the subject of a split among the circuits.[69] If it had applied to labor contracts the remedy of specific performance of arbitration promises would not have required the journey that culminated in Lincoln Mills. Indeed, in Lincoln Mills' companion case, the Circuit Court had concluded that the USAA furnished a basis for jurisdiction to enforce the labor contract's promise.[70] Although the Court affirmed the judgment it chose "to follow a different path than the Court of Appeals".[71] The practical view that the USAA was designed to supply a specific performance remedy to federal courts in admiralty disputes has today given way to what, in retrospect, is the remarkable view that every arbitration agreement is a matter of such federal concern that state law must take a back seat.[72]

Justice Frankfurter's concern that federal judges should not be charged with interpreting collective bargaining agreements (as § 301 appeared to require) was addressed in 1960 when the Court, in the Steelworkers Trilogy, made arbitration the preferred method of addressing labor disputes.[73] The Trilogy provided four fundamental principles in the field of labor law that brilliantly expanded the role of arbitrators and restricted the role of courts. The first is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[74] A corollary of that principle is that the arbitrator

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[69] See discussion in Loc. 205, United Elec., Radio and Mach. Workers of Am. (UE) v. Gen. Elec. Co., 233 F.2d 85, 99-100 (1st Cir. 1956).

[70] Loc. 205, U E, 233 F.2d at 97 (1st Cir. 1956) (The USAA "seems to us . . . a firmer statutory basis than § 301 . . . to justify departure from the judicially formulated doctrines with reference to arbitration agreements") aff'd sub nom. Gen. Elec. Co. v. Loc. 205, United Elec., Radio and Mach. Workers of Am. (U.E.), 353 U.S. 547 (1957).

[71] 353 U.S. at 548.

[72] Southland v. Keating, 465 U.S. 1 (1984); Preston v. Ferrer, 552 U.S. 346, (2008) ("the Federal Arbitration Act establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution. The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration"). Preston concerned an agreement between two individuals, hardly the classic stuff of Congress' interstate commerce power.

[73] Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[74] Warrior & Gulf, supra, at 582.

only derives his or her authority to resolve the dispute because the parties have so agreed in advance. Arbitrators, not courts, would supply the interpretive horsepower for collective bargaining agreements.

The second and third Trilogy principles address the respective roles of the arbitrator and the court. "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[75] Stated differently, "the question of arbitrability-whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination."[76] Thus, substantive arbitrability (i.e., the question of whether the parties actually agreed to arbitrate the dispute) is a question for the court unless the parties have agreed otherwise. In deciding the question of substantive arbitrability the court must avoid getting involved in the merits of the case. Even if the court views the grievance as lacking merit completely the court should order arbitration as long as the substance of the grievance is arbitrable. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."[77] Procedural arbitrability (i.e., whether the grievance was ripe for arbitration) is a question for the arbitrator.[78]

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[75] Id. at 582-83.
[76] AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986),
[77] American Mfg. 363 U.S. at 568.
[78] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) ("Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator").

The final principle coming from the Steelworkers Trilogy is that doubts are to be resolved in favor of arbitration. There is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[79]

By 1960 the Court had both federalized the common law of collective bargaining agreements and endorsed the wholesale delegation of the labor dispute resolution role to arbitrators. The role of state law had not yet been relegated to the back seat. Soon the Court, not Congress, would complete the federalization process.

In 1962 the Court considered a state court judgment awarding damages for breach of a collective bargaining agreement. The employer had sued for in state court because the union struck over the discharge of an employee for unsatisfactory work. The union had agreed to arbitrate disputes over employment terminations but it had not agreed that it would not strike over such disputes. The Court considered whether the union, by striking over an arbitrable matter, had breached the collective bargaining agreement. The Court stated its view bluntly, "It is argued [by the union] that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree".[80]

The state court had determined the matter under state law and the union complained in the Supreme Court that it should have been determined under national law. The Court agreed with the union that federal law, not state law governed. Nevertheless the Court agreed with the employer that the union had breached the collective bargaining agreement even in the absence of

[79] Warrior & Gulf, 363 U.S. at 582-83.
[80] Teamsters, Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962)

the no-strike clause.[81] Without using the word preemption, Lucas Flour stands for the proposition that state courts as well as federal courts are required to apply federal law in interpreting collective bargaining agreements under Section 301.[82] Unfortunately for the union, neither state nor federal law required an explicit no-strike clause to sustain a finding of breach.

Later in 1962 the Court considered whether a striking union could be ordered back to work during the term of the collective bargaining agreement.[83] Norris-LaGuardia had unequivocally answered the question in the negative and the Court agreed.[84] Justice Black stated that changing Norris-LaGuardia was for Congress not for the courts and the statute plainly stated that federal courts had no jurisdiction to issue no-strike injunctions.[85] Justice Brennan dissented

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[81] Justice Black dissented on this point because the contract in question had two separate arbitration provisions. One covered broad issues of contract interpretation and the other covered essentially factual disputes. The former arbitration provision contained an express undertaking that "during such arbitration, there shall be no suspension of work." 369 US at 107. The other arbitration provision did not contain such an undertaking. Not one to mince his words, Justice Black concludes "Section 301 is torn from its roots when it is held to require the sort of compulsory arbitration imposed by this decision." 369 US at 110.

[82] In Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) the Court expressly stated that the Lucas Flour rule was a rule of preemption. Allis-Chalmers extended the rule beyond cases interpreting collective bargaining agreements to claims based on state law that are intertwined with the terms of the labor contract. Indeed, echoing the Lucas holding that unexpressed obligations in collective bargaining agreements were federally enforceable, Allis-Chalmers held that the question of whether the collective bargaining agreement created implied contractual obligations was a question of federal law. Later the Court clarified that the actual construction of the collective bargaining agreement was required to preempt a state law claim for retaliatory discharge. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 410-11 (1988). See generally Haggins v. Verizon New Eng., Inc., ___F.3d ___, 2011 WL 3129761 (1st Cir. 2011); Atwater v. Natl. Football League Players Ass'n, 626 F.3d 1170, 1176-77 (11th Cir. 2010); Kitzmann v. Loc. 619-M Graphic Commun. Conf. of Intern. Broth. of Teamsters, 415 Fed. Appx. 714, 717 (6th Cir. 2011)(unpublished); Smart v. Loc. 702 Intern. Broth. of Elec. Workers, 562 F.3d 798, 809 (7th Cir. 2009); Holschen v. Intl. Union of Painters & Allied Trades/Painters Dist. Council #2, 598 F.3d 454, 461 (8th Cir. 2010); Compare Adkins v. Mireles, 526 F.3d 531, 541 (9th Cir. 2008) with Jacobs v. Mandalay Corp., 378 Fed. Appx. 685, 687 (9th Cir. 2010)(unpublished); Burnside v. Kiewit P. Corp., 491 F.3d 1053, 1066 (9th Cir. 2007).

[83] Lucal Flour had concerned a legal judgment. This question involved the equity power of the federal court, a matter squarely addressed by Norris-LaGuardia.

[84] Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

[85] "[i]t is doubtless true, as argued, that the right to sue which § 301 gives employers would be worth more to them if they could also get a federal court injunction to bar a breach of their collective bargaining agreements. Strong arguments are made to us that it is highly desirable that the Norris-LaGuardia Act be changed in the public interest. If that is so, Congress itself might see fit to change that law and repeal the anti-injunction provisions of the Act insofar as suits for violation of collective agreements are concerned, as the House bill under consideration originally provided. It might, on the other hand, decide that if injunctions are necessary, the whole idea of enforcement of these agreements by private suits should be discarded in favor of enforcement through the administrative machinery of the Labor Board, as Senator Taft provided in his Senate bill. Or it might decide that neither of these methods is entirely satisfactory and turn instead to a completely new approach. The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress-it is a question for law

on the ground that the Court should accommodate the Norris-LaGuardia Act to the Taft-Hartley Act.[86] In time, Justice Brennan's view would prevail unassisted by Congressional support. The Court did it all by itself.

In 1968 the Court decided that § 301 deprived even a state court of jurisdiction to enjoin a strike.[87] The employer had gone to state court in Tennessee to obtain an injunction against a strike in violation of a no-strike clause. The state court had granted the injunction. The union removed the case to federal court and argued, on the strength of Sinclair, that the case raised federal issues and that the injunction was beyond the state court's power. The federal court took jurisdiction of the matter and dissolved the injunction. The Supreme Court agreed that there was federal jurisdiction to entertain the case.

The labor injunction problem came full circle for labor organizations in 1970 when the Supreme Court decided Boys Markets v. Retail Clerks, 398 U.S. 235 (1970). The case arose in a supermarket when non-bargaining unit personnel rearranged certain frozen food items. The union protested that the work of arranging and rearranging was bargaining unit work and it threatened to strike unless the items were removed and replaced by bargaining unit workers. The federal district court enjoined the work stoppage and the Ninth Circuit reversed on the authority of Sinclair Refining.[88]

The Supreme Court reversed the Ninth Circuit. The Court rejected the union's argument that the Court should observe *stare decisis* (i.e., when a matter has been decided previously, as it had in Sinclair, the decision should be treated as precedent). The Court found Sinclair to be a

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makers, not law interpreters. Our task is the more limited one of interpreting the law as it now stands". 370 U.S. 214-15.

[86] 370 U.S. at 216-226. Justice Brennan raised the interesting question of whether state courts retain the power to enjoin strikes. Because Norris-LaGuardia applied only to federal courts, state courts were free to issue injunctions in labor disputes unless limited by state law. Lucas Flour's holding that state courts must apply federal law raised the question of whether state courts were now constrained by Norris-LaGuardia when before they were not.

[87] Avco Corp. v. Machinists, Lodge 735, 390 U.S. 557.

[88] 416 F.2d 368 (9 Cir. 1969).

departure from congressional policy to promote peaceful resolution of labor disputes through arbitration. What about the objection that Congress could have, but did not, amend Norris-LaGuardia? The Court said "in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of Sinclair, the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision".[89]

State courts had routinely been granting injunctions against labor unions and the Supreme Court sanctioned the practice in both state and federal courts by overruling Sinclair. Federal courts were now back in the business of granting injunctions in labor disputes, at least those disputes where a collective bargaining agreement contained a no-strike clause.

In 1976 the Court heard an employer's complaint that the union a had struck in violation of its promise not to strike. The employer had requested a Boys Markets injunction. The union protested that the strike was in sympathy with another union whose picket lines the union was honoring. The Court agreed with the union because the rationale of Boys Markets was to promote arbitration of grievances, not simply to force workers back to work.[90] In Buffalo Forge the union was not striking over an arbitrable dispute. It was engaging in a sympathy strike. The employer's request for an injunction was denied.

Today Norris-LaGuardia holds a peripheral, not a central, position in labor law. Its central motivation, to remove federal courts from regulating union conduct through injunctions, has been compromised by subsequent events. Nevertheless, Norris-LaGuardia remains a defense against the occasional petition for a preliminary injunction. Recently the Sixth Circuit affirmed a district court's refusal to enjoin a union's campaign to overwhelm a company's voice mail and

[89] 398 U.S. at 242.
[90] Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976).

email capacities.[91] The case grew out of a labor dispute and required compliance with the procedural prerequisites of Norris-LaGuardia. Similarly, the Eighth Circuit looked beyond the players' decertification of their union to view their antitrust claims as part of a labor dispute.[92] Norris-LaGuardia's requirement of irreparable harm continues to apply, even in a Boys Markets case.[93] Norris-LaGuardia continues to require a bond and, in appropriate circumstances a defendant wrongfully enjoined can recover fees and costs even in the absence of a bond.[94]

The Norris-LaGuardia Act is the Wagner Act's older cousin. It survives as a marker of where we have been as a nation: a time when state law governed tort actions but federal courts were free to apply their own view of 'general law'.[95] Since the 1930's, federal courts have substantially eclipsed state courts in field of labor management relations. Those who complain about government regulation of business are not offended by the fact of government regulation of labor organizations. Norris-LaGuardia marked a period when the American people understood the excesses of unregulated business and, for a time, they tolerated unregulated union activity. Indeed there are many who trace the rise of the American middle class to the successes of organized labor in the years following the passage of Norris-LaGuardia.

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[91] Pulte Homes, Inc. v. Laborers' Intern. Union of N. Am., ___ F.3d ___, 2011 WL 3274014 (6th Cir. 2011).
[92] Brady v. Natl. Football League, 644 F.3d 661, 670-71 (8th Cir. 2011).
[93] Verizon New Eng., Inc. v. Intl. Broth. Of Elec. Workers, Loc. No. 2322, ___ F.3d ___, 2011 WL 2568008 (1st Cir. 2011).
[94] Michigan Am. Fedn. of State County and Mun. Employees Council 25, Loc. 1640 v. Matrix Human Services, 589 F.3d 851, 855 (6th Cir. 2009).
[95] Swift v. Tyson, 41 U.S. 1 (1842) interpreted the Judiciary Act as obliging federal courts to apply state statutes but not decisions of state courts in matters of 'general law'. The doctrine was not abandoned until 1938 when the Court decided Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).