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# LABOR INJUNCTIONS IN BANKRUPTCY: THE NORRIS-LAGUARDIA FIREWALL

*Michael C. Duff\**

## INTRODUCTION

This article will show that federal courts have lacked, and continue to lack, authority to enjoin private sector employees from peacefully striking, picketing, or leafleting in connection with labor disputes, including those arising in bankruptcy. The source of this broad prohibition is a statutory firewall<sup>1</sup> known as the Norris-LaGuardia Act.<sup>2</sup> The narrow exception to the rule is that federal courts may enjoin peaceful labor conduct, in extremely limited circumstances, to harmonize the NLGA with certain duties required of unions under the Railway Labor Act or under Section 301 of the Labor-Management Relations Act.<sup>3</sup>

As the article was in its formative stages, a full-blown season of the bankruptcy of unionized firms (among others) emerged from the preexisting general chaos of the American economy.<sup>4</sup> Some of the events making up this season received significant news coverage. Chrysler and General Motors, both unionized automakers, filed for bankruptcy in the late spring of 2009.<sup>5</sup> In roughly the same 6-month time period, the Republic Windows

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<sup>1</sup> A firewall is defined as: "a fireproof wall to prevent the spread of fire, as from one room or compartment to the next; [or] anything serving as a protective barrier; specif., a program or system designed to protect a computer network from unauthorized access, as over the Internet." WEBSTER'S NEW WORLD DICTIONARY (2009)

<sup>2</sup> 29 U.S.C. §101 et seq. Hereinafter, the shorthand "NLGA" will be used frequently in lieu of the full statutory reference.

<sup>3</sup> Anti-injunctive provisions of the National Labor Relations Act are an additional exception, but they are sought by and granted to the Government rather than a private litigant, and only in specialized statutory circumstances. *See infra* Section I.C.

<sup>4</sup> *Total Bankruptcy Filings Increase Nearly 35 Percent over First Quarter 2008; Business Filings Jump Over 64 Percent*, AMERICAN BANKRUPTCY INSTITUTE, June 9, 2009, available at <http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=57797&TEMPLATE=/CM/ContentDisplay.cfm> (last visited July 2, 2009) (observing that American Bankruptcy Institute expected total bankruptcy filings to surge past 1.4 million by the end of 2009).

<sup>5</sup> Among the many articles *see Chrysler files for bankruptcy protection: Obama says*

and Hartmarx companies became embroiled in unusual bankruptcy (or near-bankruptcy) controversies in which the unions representing their employees attempted to influence their respective financiers' decisions concerning whether to extend operating credit to the companies.<sup>6</sup> These companies have probably escaped this round of bankruptcy proceedings without serious labor strife,<sup>7</sup> though the materialization of subsequent rounds is not unimaginable. Each of the scenarios nevertheless serves as a reminder of both the potential for labor disputes between unions and bankrupt employers, in the course of bankruptcy proceedings, and of the variety that such disputes may assume. Thorny -- even unprecedented<sup>8</sup> -- issues could

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*automaker will 'thrive' in partnership with Italy's Fiat*, Associated Press, MSNBC, April 30, 2009 available at <http://www.msnbc.msn.com/id/30489906/> (last visited June 27, 2009), Kevin Krolicki and John Crawley, *GM files for bankruptcy, Chrysler sale cleared*, REUTERS, June 1, 2009, available at <http://www.reuters.com/article/topNews/idUSN3044658620090601> (last visited June 27, 2009), Nelson Lichtenstein, *Time for Another Reuther Plan: Autoworkers should confront this crisis as they would have in the past: boldly and visibly*, THE NATION, June 1, 2009 at 16 (concluding that "time has run out" for Chrysler and General Motors).

<sup>6</sup> Hartmarx, President Obama's reputed suit maker of choice, filed for bankruptcy in January 2009. The Union representing Hartmarx's employees objected to Wells Fargo's reluctance to approve of the company's acquisition by a British company, Emerisque Brands, in lieu of liquidation. The protest assumed the form of a rally with an accompanying threat to take over the Hartmarx factory and "sit in" if Wells Fargo attempted to liquidate the company. See Kia Carter, *Hartmarx dilemma may cost 300 jobs in Rock Island*, CHI. TRIB., May 12, 2009 available at <http://www.chicagotribune.com/news/wqad-hartmarx-jobs-rockisland-051209,0,3739223.story> (last visited June 27, 2009). Emerisque eventually received the approval of the bankruptcy court to take over Hartmarx. *Bankruptcy court OKs sale of suitmaker Hartmarx*, CHI. TRIB., June 26, 2009. Republic Windows had closed its doors earlier, in December 2008, and unionized employees in response promptly staged an actual sit in. The drama surrounding the sit in transpired prior to the filing of a bankruptcy petition. See Steven Gray, *Republic Windows Sit-In: What are Workers Owed?*, TIME, December 8, 2008 available at <http://www.time.com/time/nation/article/0,8599,1865226,00.html> (last visited June 27, 2009). Whether these job actions were in themselves lawful or protected under federal labor law is beyond the scope of this article.

<sup>7</sup> Most significantly, the United Autoworkers union agreed to a series of concessions as part of a larger agreement between the Government and General Motors. See *UAW agrees to new GM deal: Union agrees with change in funding for retiree health care, one of key obstacles GM needed to clear to avoid bankruptcy. But other hurdles remain*, CNNMONEY.COM, May 21, 2009 available at [http://money.cnn.com/2009/05/21/news/companies/gm\\_uaw/](http://money.cnn.com/2009/05/21/news/companies/gm_uaw/) (last visited June 27, 2009). As circumstances have unfolded, it appears this agreement was a necessary preliminary to the bankruptcy filing.

<sup>8</sup> It will be difficult, for example, even to describe the reorganized General Motors venture. Even elementary predicates may be difficult to establish: Who is the employer? (Government? Union? Taxpayers?) What is the union? (Owner? Representative of the employees?). Once the predicates have been established, the ensuing analyses of particular

become a subject of contention between bankrupt employers and unions representing their employees. These issues lie at the intersection of labor and bankruptcy law.<sup>9</sup> This article addresses a narrow but important question at the threshold of this murky doctrinal interface. If a union strikes, pickets or leaflets a bankrupt employer, after the employer has filed a bankruptcy petition, may a federal court grant an injunction (or enforce a statutory stay) suspending the conduct?<sup>10</sup> The question of injunctions in labor disputes has been important for as long as there has been a labor movement: a labor injunction issued against a union during the early stages of a strike will tend to permanently defeat the strike.<sup>11</sup>

Some observers speculated that the United Autoworkers would feel compelled to strike over the unprecedented concessions the union was

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issues are unlikely to become less complex.

<sup>9</sup> The discussion throughout the article presumes a "reorganization" filing under Chapter 11 of the Code, and the employer-debtor is presumed to be the debtor-in-possession -- an employer that has been permitted to continue direct operation of its business. The article also presumes that an employer rather than a bankruptcy trustee would be attempting to obtain an injunction, but this need not be so.

<sup>10</sup> Almost all legal doctrine and academic commentary on this issue was authored in the 1980s. See *Elsinore Shore Associates vs. Local 54, Hotel Employees and Restaurant Employees International Union*, 820 F.2d 62 (3rd Cir. 1987); *Briggs Transportation Co. v. International Brotherhood of Teamsters*, 739 F.2d 341 (8th Cir. 1984); *Crowe & Associates, Inc. v. Bricklayers and Masons Union Local No. 2*, 713 F.2d 211 (6th Cir. 1983); *Petrusch v Teamsters Local 317*, 667 F.2d 297 (2nd Cir.1981) *cert. denied*, 456 U.S. 974, 102 S.Ct. 2238, 72 L.Ed.2d 848 (1982); see also Thomas R. Haggard, *The Power of the Bankruptcy Court to Enjoin Strikes: Resolving the Apparent Conflict Between the Code and the Anti-Injunction Provisions of the Norris-LaGuardia Act*, 53 Geo. Wash. L. Rev. 703 (1985) [hereinafter, *Apparent Conflict*]; Charles B. Craver, *The Impact of Financial Crises upon Collective Bargaining Relationships*, 56 Geo. Wash. L. Rev. 465 (1988) [hereinafter, *Impact of Financial Crises*]; Stephen L. Poe, Note, *The Automatic Stay of the 1978 Code Versus the Norris LaGuardia Act: A Bankruptcy Court's Dilemma*, 61 Tex. L. Rev. 321, 327-28 (1982) [hereinafter, *Bankruptcy Court's Dilemma*]; Nancy L. Lowndes, Note, *Workers' Rights against a Bankrupt Employer*, 26 Wm. & Mary L. Rev. 545 (1985) [hereinafter, *Workers' Rights*].

The 1980s commentary was appropriate because business bankruptcy filings during that period rose by roughly 60%, from 48,125, in 1981, to 82,446 in 1987. ANNUAL BUSINESS AND NON-BUSINESS FILINGS BY YEAR (1980-2008), AMERICAN BANKRUPTCY INSTITUTE available at <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=57826&TEMPLATE=/CM/ContentDisplay.cfm>.

The past is prologue. Business bankruptcy filings rose from 28,322, in 2007, to 43,546, in 2008. There have been 14,319 business bankruptcy filings in the first quarter of 2009 alone. See *id.* It would seem an appropriate time, therefore, to resume the discussion.

<sup>11</sup> FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 201 (The MacMillan Co. 1930): "The injunction cannot preserve the so-called status quo . . . The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences." *Id.*

asked to make under the agreement between General Motors and the U.S. Government, which facilitated the automaker's survival.<sup>12</sup> In the General Motors context this kind of speculation was probably idle because a strike could have prompted the Government to withdraw taxpayer funding of the company, leading to the company's liquidation and the loss of union jobs.<sup>13</sup> But in the Republic Windows and Hartmarx matters, workers with much less likelihood of retaining jobs, and therefore probably with less to lose, engaged in audacious sit-down strikes (or credibly threatened such strikes).<sup>14</sup> Even in the context of the complex automakers' agreements, hammered out in bankruptcy court between creditors and bankrupt employers, where unions have at least some hope of holding on to at least some jobs (and would therefore be less likely to take risks), labor disputes could conceivably arise at the eleventh hour.<sup>15</sup>

The kinds of labor disputes that could arise after a unionized employer files a petition in bankruptcy would be extremely varied. Unions might, for example, strike, picket or leaflet over a court's authorization for an employer to reject a collective bargaining agreement that existed prior to the commencement of bankruptcy proceedings.<sup>16</sup> Even absent a preexisting

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<sup>12</sup> Justin Hyde and Tim Higgins, *UAW Strike would kill auto loans. Auto rescue terms raise stakes in deal mandating changes in pay, benefits*, DETROIT FREE PRESS, January 9, 2009 available at <http://www.freep.com/article/20090109/BUSINESS01/901090397/> (last visited June 27, 2009).

<sup>13</sup> *Id.*

<sup>14</sup> See Steven Greenhouse, *Workers Pressure Bank to Keep Clothier's U.S. Plants Open*, N. Y. Times, May 11, 2009 available at [http://www.nytimes.com/2009/05/12/business/12hartmarx.html?\\_r=1&scp=13&sq=Hartmarx&st=cse](http://www.nytimes.com/2009/05/12/business/12hartmarx.html?_r=1&scp=13&sq=Hartmarx&st=cse) (last visited June 24, 2009).

<sup>15</sup> A bankruptcy court may also retain jurisdiction of a case after it confirms a reorganization plan, if necessary to ensure the plan is being properly implemented. *Goodman v. Phillip R. Curtis Enterprises*, 809 F.2d 228, 232 (4th Cir. 1987). As testimony to the complexity of the automakers reorganization cases, Jones Day, the lead law firm in the Chrysler reorganization, reportedly petitioned the federal district court in Manhattan to authorize payment by Chrysler of 114.7 million dollars. Restructuring transaction costs probably exceeded 372 million dollars. Linda Sandler, *Chrysler Lawyers Seek Fees Before Other Creditors*, BLOOMBERG.COM, May 7, 2009 available at <http://www.bloomberg.com/apps/news?pid=20601127&sid=agun7zOPdHNg&refer=law> (last visited June 24, 2009). Though the automakers bankruptcy cases appear to have sailed through the reorganization process, see Micheline Maynard, *Automakers' Swift Cases in Bankruptcy Shock Experts*, N.Y. TIMES, July 6, 2009 available at <http://www.nytimes.com/2009/07/07/business/07bankruptcy.html?emc=eta1> (last visited July 9, 2009), one wonders whether that should be cause for celebration or concern. One can imagine, for example, intense periods when reductions in force, simple on paper, are actually being implemented.

<sup>16</sup> Rejection or modification of the agreement may be authorized by a bankruptcy court pursuant to 11 U.S.C. § 1113; see e.g. *Briggs v. International Brotherhood of Teamsters*, *supra* n.10, 739 F.2d 341 (holding that peaceful picketing by union protesting

collective bargaining agreement – where, for example, a newly certified union did not have time to negotiate such an agreement before an employer filed for bankruptcy -- the union might nevertheless protest modifications to non-contractual terms and conditions of employment, or might object to the mere proposal of changes. Aside from specific employment issues, a union might picket or strike to protest the conduct of the bankruptcy proceedings themselves.<sup>17</sup>

Some legal commentators have asserted that there is a sound rationale supporting the general injunctive authority of federal bankruptcy courts over labor disputes, despite the existence of the NLGA, a statute meant to exclude the federal judiciary in its entirety from injunctive involvement in labor disputes.<sup>18</sup> The Supreme Court has never addressed the question, and only four Federal circuits have squarely reached it -- roughly a quarter-century ago -- under the modern Bankruptcy Code.<sup>19</sup>

This article's thesis is that under the NLGA, a "super-statute" that has remained undisturbed by courts since 1932, federal courts lack jurisdiction to issue injunctions in labor disputes arising under the Bankruptcy Code of 1978. Exceptions to the NLGA's anti-injunction provisions are rare and have arisen only when courts have read the NLGA *in pari materia* with other labor statutes "as a part of a pattern of labor legislation."<sup>20</sup> Part I of the article considers the NLGA in terms of its structure, exceptions, and

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modifications of collective bargaining agreement not subject to injunction despite authorization of modifications by bankruptcy court). This was an issue lurking beneath the surface of the Hartmarx controversy. The union, attempting to leverage its position with a strike threat, was seeking a buyer that would recognize it as majority representative of Hartmarx employees and not make significant modifications to its collective bargaining agreement with Hartmarx. Even if a buyer agrees to step into the shoes of Hartmarx's collective bargaining relationship, or assumes its collective bargaining agreement with the union, the change in ownership may not achieve the union's objective. Hartmarx's buyer would probably not be precluded from requesting the bankruptcy court to reject the existing collective bargaining agreement in this or a subsequent bankruptcy case.

<sup>17</sup> The complexity of the automakers' deliberations with the Government, for example, might have generated such a response from the United Autoworkers had those negotiations been carried out after the bankruptcy petition was filed.

<sup>18</sup> See JOHN J. GALLAGHER ET AL., *AN UNHAPPY CROSSROADS: THE INTERPLAY OF BANKRUPTCY AND AIRLINE LABOR LAW* Section IV.B (2004).

<sup>19</sup> Those cases, which will be discussed at various points throughout the article, are *Elsinore Shore Associates vs. Local 54, Hotel Employees and Restaurant Employees International Union*, 820 F.2d 62 (3rd Cir. 1987); *Briggs Transportation Co. v. International Brotherhood of Teamsters*, 739 F.2d 341 (8th Cir. 1984) *cert denied* 469 U.S. 917 (1984); *Crowe & Associates, Inc. v. Bricklayers and Masons Union Local No. 2*, 713 F.2d 211 (6th Cir. 1983); *Petrusch v Teamsters Local 317*, 667 F.2d 297 (2nd Cir.1981) *cert. denied* 456 U.S. 974, 102 S.Ct. 2238, 72 L.Ed.2d 848 (1982).

<sup>20</sup> *Brotherhood of R. R. Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 42 (1957)

reaffirmation by the Supreme Court in the *Burlington Northern*<sup>21</sup> case. Part II of the article discusses the potential for conflict between the NLGA anti-injunction provision and the injunction provisions of the bankruptcy code. Part III of the article undertakes a theoretical exploration of the potential for conflict in these seemingly competing provisions.

## I. THE NORRIS-LAGUARDIA ACT

### A. Structure

The Norris LaGuardia Act strictly limits the injunctive authority of the federal courts. Sections 1 and 2 of the NLGA set out the policy and overall purpose of the Act:

No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a *strict conformity* with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.<sup>22</sup>

Section 2 leaves little doubt that Congress intended that courts interpret the Act liberally in favor of the policy referenced in Section 1, i.e., the broad protection of employee organization, collective bargaining, and mutual aid or protection.<sup>23</sup>

The NLGA unambiguously curtails federal courts' authority to issue injunctions in labor disputes, and clearly sets forth a policy protective of

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<sup>21</sup> *Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987).

<sup>22</sup> 29 U.S.C. § 101

<sup>23</sup> 29 U.S.C. § 102. Section 2 states in relevant part:

. . . [T]he public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he 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 in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

employee rights. Section 4 of the Act additionally declares that during labor disputes federal injunctions are absolutely prohibited from interfering with nine separate categories of peaceful employee conduct.<sup>24</sup> Of particular interest, for purposes of this discussion, is the statute's complete removal from the ambit of federal injunctive authority of peaceful work stoppages, and giving publicity to a labor dispute in a peaceful, non-fraudulent manner, including by "patrolling,"<sup>25</sup> of the facts surrounding labor disputes.<sup>26</sup>

Section 7 of the NLGA, however, qualifies that at least some federal injunctions may issue in labor disputes when "unlawful acts . . . have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained."<sup>27</sup> Even when injunctions falling within this exception to the general prohibition are authorized,<sup>28</sup> the complainant must prove additional facts in order to invoke federal injunctive power. Those facts must show:

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<sup>24</sup> The categories are set out in Section 4 and include the following employee conduct: (a) Ceasing or refusing to perform any work or to remain in any relation of employment; (b) Becoming or remaining a member of any labor organization or of any employer organization . . . ; (c) Paying or giving to, or withholding from, any person participating or interested in [a] labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value; (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State; (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; (g) Advising or notifying any person of an intention to do any of the acts heretofore specified; (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of [the Act].

<sup>25</sup> Patrolling is essentially communicating a message while in motion.

<sup>26</sup> 29 U.S.C. § 104(a) and 104(e), respectively; *see* previous note.

<sup>27</sup> 29 U.S.C. § 107:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony . . . to the effect . . . (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . ."

<sup>28</sup> The Supreme Court has previously rejected a theory that under the NLGA a Federal court may issue an injunction to restrain labor activity alleged to be unlawful where the activity complained of is unaccompanied by fraud or violence. *Marine Cooks and Stewards, AFL v. Panama S. S. Co.*, 362 U.S. 365, 371 (1960) ("And even if unlawful, it would not follow that the federal court would have jurisdiction to enjoin the particular conduct which s 4 of the Norris-LaGuardia Act declared shall not be enjoined.").



[T]hat substantial and irreparable injury to its property would result in the absence of injunctive relief; that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; that complainant has no adequate remedy at law; that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection . . .<sup>29</sup>

Section 13 of the Act contains the statute's operative definitions, explaining when a case involves or grows out of a labor dispute,<sup>30</sup> when persons or associations will be held to be "participating or interested in" a labor dispute,<sup>31</sup> and setting forth the elements of a statutory labor dispute.<sup>32</sup> The definitions, even prior to consideration of the Act's history and context, reflect a clear Congressional intent to sweep up cases that in almost any manner involve or grow out of a labor dispute, to create a presumption that "persons or associations" with even an indirect interest in a labor dispute are participants covered by the statute, and to include almost all forms of workplace conflict in the statutory category of "labor dispute."<sup>33</sup>

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<sup>29</sup> Norris-LaGuardia Act, 29 U.S.C. § 107(b)-(e)

<sup>30</sup> 29 U.S.C. § 113(a):

[A] case grows out of a labor dispute when [it] the involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employees or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section) . . .

<sup>31</sup> 29 U.S.C. § 113(b):

A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

<sup>32</sup> 29 U.S.C. § 113(c):

The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

<sup>33</sup> When Congress enacted the National Labor Relations Act in 1935 - a mere three

## B. Critical Historical Background of the NLGA

While the text of the NLGA standing alone clearly establishes that federal courts are flatly deprived of authority to issue injunctions in labor disputes, it has nevertheless been questioned whether the breadth of the exclusion was actually intended by the Congress of 1932. Professor Thomas Haggard, for example, described the underlying policy of that legislature as follows:

Congress concluded that the federal judiciary was biased in favor of management and that courts were abusing their equity powers by issuing, often on a purely ex parte basis, overly broad injunctions against strikes and other forms of collective activity by labor unionists. Moreover, the antitrust and tort doctrines upon which the courts relied either reflected some of the influence of the old criminal-conspiracy doctrine or were otherwise regarded as open ended vehicles through which the courts expressed their predilections about labor relations and social policy. Nevertheless, at that time, Congress was allegedly in a laissez faire mood - not yet willing to legislate affirmatively in favor of labor unions, but also unwilling to let the courts "legislate" in favor of management.<sup>34</sup>

Professor Haggard's view is consistent with other commentators who have tended to suggest that the NLGA was a congressional response primarily limited to remedying the judicial practice of issuing injunctions in labor disputes styled, artfully, as antitrust cases.<sup>35</sup> However, such an explanation

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years following the enactment of the Norris-LaGuardia Act - it defined the term "labor dispute" in almost identically broad fashion in Section 2(9) of that statute, suggesting that the sweeping Norris-LaGuardia definition continued to be intended. The common definition is that a labor dispute "includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

<sup>34</sup> Haggard, *Apparent Conflict*, at 706, citing 75 CONG. REC. 4915 (1932) (statement of Sen. Wagner) ("The policy and purpose which gives meaning to the present legislation is its implicit declaration that the Government shall occupy a neutral position, lending its extraordinary power neither to those who would have labor unorganized nor to those who would organize it . . ."); Archibald Cox, *LAW AND THE NATIONAL LABOR POLICY* 8 (1960).

<sup>35</sup> Haggard, *Apparent Conflict*, at 714:

only partly tells the story.

Aggressively ousting federal courts from labor disputes altogether was the legislative motive behind passage of the Act.<sup>36</sup> The NLGA was intended as a forceful and unequivocal resolution of what the judges, but not Congress, saw as an ambiguity in the Clayton Act.<sup>37</sup> Congress had previously assumed that the Clayton legislation would utterly strip federal courts of injunctive authority in labor disputes.<sup>38</sup> Even this formulation may not state the case strongly enough, however. It is not simply that Congress thought the Clayton Act had been honestly misconstrued. Rather, Congress -- at least some in Congress<sup>39</sup> -- thought the federal judiciary had deliberately misconstrued the Clayton Act.

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The relationship between the Norris-LaGuardia Act and the antitrust laws is unique, and a historical analysis of this relationship indicates that Congress intended the Norris-LaGuardia Act to address union activities, primarily in the context of those activities' alleged illegality under the antitrust laws.

<sup>36</sup> Congress substantially locked out the federal courts from involvement in labor disputes until the enactment of the Taft-Hartley Act in 1947. *But see* the discussion *infra* at I.C.

<sup>37</sup> 38 Stat. 730. The Clayton Act, which was passed in 1914, was to remedy the abuses of the Sherman Act and to exempt labor unions from antitrust laws.

Section 6 of the Clayton Act stated as the policy of the act, "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural and horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members from such organizations from lawfully carrying out the legitimate objectives thereof; nor shall such organizations or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.." Labor leader Samuel Gompers hailed the Clayton Act as the laborer's "Magna Charta." Jon R. Kerian, *Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act*, 37 N. D. L. Rev. 49 (1961).

The case provoking the NLGA legislative response was *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). In *Duplex*, a machinists union struck a Michigan-based manufacturer of printing presses. To enhance the impact of the strike, the union broadened its appeals to unions and employees in other states where the manufacturer's presses were sold, thereby generating a secondary boycott. *Id.* 463-64. The Court concluded that the anti-injunctive language of the Clayton Act did not extend to secondary boycotts and that federal courts were accordingly authorized to issue injunctions in such cases. *Id.* at 478.

38 ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW: CASES AND MATERIALS* 38 (14th Ed. Foundation Press 2006).

<sup>39</sup> Whether the criticism of the *Duplex* court was entirely fair is another matter, for there were clearly conflicting statements in the legislative record as to whether the anti-injunction provision of the Clayton Act reached secondary boycotts. *Duplex*, *supra*, 254 U.S. at 474-477, especially n.2 (statements of Mr. Webb). The point is that the perception of a significant portion of the Congress passing the NLGA was that federal judges had deliberately flouted the Clayton Act.

Evidence of this more broadly hostile sentiment is the statement of Representative LaGuardia himself, made during the debate over the bill in the House of Representatives:

Gentlemen, there is one reason why this legislation [the Norris-LaGuardia Act] is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges. If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now. If the courts had not *emasculated and purposely misconstrued* the Clayton Act, we would not today be discussing an anti-injunction bill.<sup>40</sup>

And lest it be thought that the hostility was limited solely to passions aroused by the alleged misconstruction of the Clayton Act, an arguably narrow complaint, further examination of the Congressional Record reveals the breadth of the antipathy:

. . . [T]hese great monopolistic combinations control property running into the billions in value; and are we going to turn them over to the tender mercies of a few fellows down in the earth who are digging coal, and not give them the right to commence in the Federal courts an action for an injunction to enable them to obtain their rights? Why, before we get through we will have deprived these large corporations of their rights under the Constitution; we will have nullified all the provisions of the Constitution. We ought to hesitate before we take away from these suffering companies the blessed right to have an injunction issued by a Federal judge, holding office for life, who, perhaps, forsooth, has obtained his job upon the recommendation of the very men and the very corporations who are asking the injunctions at his hands. We ought to be careful and see that we do not take away from that judge the right to make good to those who set him on a pedestal, made him a tyrant for life, and a monarch of all he surveys. We have got to be careful.<sup>41</sup>

These passages leave very little room for doubt of the general

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<sup>40</sup>Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. at 438-39 (1987) *citing* 75 Cong. Rec. 5478 (emphasis supplied).

<sup>41</sup>Statement of Rep. Norris, 75 Cong. Rec. 4938

antagonism that Congress felt towards the federal judiciary.

A book entitled *The Labor Injunction*, coauthored by then Harvard law professor and later Supreme Court Justice Felix Frankfurter, and Nathan Greene, also influenced the Congress of 1932.<sup>42</sup> That work broadly alleged that the federal judiciary had historically relied on an array of ambiguous legal theories to justify issuance of injunctions in labor disputes, premised on a variety of substantive areas, including breach of contract<sup>43</sup> and interference with railroad receiverships.<sup>44</sup>

Frankfurter and Greene's discussion of the historical role of railroad receiverships in the courts' development of a rationale to justify issuing labor injunctions remains particularly valuable to understanding the policy of the NLGA. As commentators of the early 1930s were aware, the use of federal injunctions in labor disputes was first developed in this context.<sup>45</sup>

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<sup>42</sup> FRANKFURTER & GREENE, *THE LABOR INJUNCTION*, see *supra* n.11; see also Haggard, *Apparent Conflict*, 706. One commentator has alleged that the personal biases of Frankfurter & Greene influenced those authors' conclusions. See Petro, *Injunctions and Labor Disputes: 1880-1932. Part 1. What the Courts Actually Did - and Why*, 14 Wake Forest L. Rev., 341 passim (1978). Even if this were true, *THE LABOR INJUNCTION* was nevertheless a primary influence on Congress and is therefore an indispensable resource for divining congressional intent in enacting the NLGA. For evidence that the Congress believed the conclusions of Frankfurter and Greene, and a good deal more, consider the statement of Rep. McGugin made on the House floor on March 8, 1932:

Some day and some time, when the history of this country is written, some historian will obtain a copy of one of these tyrannical labor injunction decrees and will point out how far the courts went in excess of their rights and contrary to human liberty and righteousness. Injunctions enjoining a man from talking to his neighbor about anything which he may want to discuss, whether it be a strike or a labor dispute, or what not, is contrary to the true principles of liberty. If there were not a single laboring man in the United States asking for this bill, we should curb the power of the courts in granting these injunctions, upon the broad principle that such injunctions are a menace to liberty. (Applause.) 75 Cong. Rec. 5500

For a general critique of Petro's methods see William E. Forbath, *The Shaping of the Labor Movement*, 102 Harv. L. Rev. 1109, 1250-51 n.61 (1989) [hereinafter *Shaping of the Labor Movement*].

<sup>43</sup> Frankfurter and Greene, *THE LABOR INJUNCTION*, 39-40. Indeed, the entirety of Section 3 of the NLGA is devoted to rendering unenforceable in federal courts the "yellow dog" contract, an agreement between an employer and employee that the employee would refrain from joining or remaining a member of a union. A union's alleged interference with such a contract was one method by which employers had successfully "federalized" labor disputes, making them susceptible to federal injunction. See *e.g.* *Coppage v. Kansas*, 236 U.S. 1 (1915).

<sup>44</sup> *Id.* at 23.

<sup>45</sup> See, *e.g.*, Walter Nelles, *A Strike and Its Legal Consequences - An Examination of*

The railroad strikes of 1877,<sup>46</sup> occurring in the context of such receiverships,<sup>47</sup> were the probable catalyst for the first federal judicial involvement in labor disputes.<sup>48</sup> Frankfurter and Greene alleged, "[i]t was an easy transition to indulge in [labor] injunctions apart from receiverships."<sup>49</sup> Once federal labor injunctions were permitted in the railroad receivership context on policy grounds, apparently they were imported to other contexts.

The receiverships of the 1870s and 1880s differed from bankruptcy.<sup>50</sup> However, like bankruptcy, receiverships were a form of corporate reorganization made necessary by a firm's extreme financial difficulty.<sup>51</sup> As

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*the Receivership Precedent for the Labor Injunction*, 40 Yale L. J. 507 (1930-1931). The general increase in the issuance of labor injunctions was well underway by 1862. See Benjamin Aaron, *The Labor Injunction Reappraised*, 10 UCLA L. Rev. 292, 292 n.1 (1963) citing Edwin E. Witte, *Early American Labor Cases*, 35 Yale L. J. 825, 833 (1926).

<sup>46</sup> Selig Perlman, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES, Chapter 2:

The strikes of 1877, which on account of the wide area affected, the degree of violence displayed, and the amount of life and property lost, impressed contemporaries as being nothing short of social revolution, were precipitated by a general ten percent reduction in wages on the three trunk lines running West, the Pennsylvania, the Baltimore & Ohio, and the New York Central, in June and July 1877. This reduction came on top of an earlier ten percent reduction after the panic. The railway men were practically unorganized so that the steadying influence of previous organization was totally lacking in the critical situation of unrest which the newly announced wage reduction created.

The legislative history also shows that the Debs case was also much on the mind of Congress. See 75 Cong. Rec. 5475 (statement of Mr. Beck).

<sup>47</sup> Nelles, *Receivership Precedent*, 515.

<sup>48</sup> *Id.* at 533.

<sup>49</sup> Frankfurter and Greene, *THE LABOR INJUNCTION*, 23. See also Nelles, *Receivership Precedent*, at 533 (quoting the contemporaneous advocacy of President Scott of the Pennsylvania Railroad for general Federal injunctive authority over labor disputes):

It will hardly be contended that the railroad companies must become bankrupt in order to make secure the uninterrupted movement of traffic over their lines, or to entitle them to the efficient protection of the United States government . . . The laws which give the Federal courts the summary process of injunction to restrain so comparatively trifling a wrong as infringement of a patent right certainly must have been intended or ought to give the United States authority to prevent a wrongdoing which not only destroys a particular road but also paralyzes the commerce of the country and wastes the national wealth.

<sup>50</sup> For one thing, courts of the era were quite willing to take over direct supervision of a financially ailing railroad. Forbath, *Shaping of the Labor Movement* at 1155 n.196.

<sup>51</sup> Nelles, *Receivership Precedent*, at 515. During the depression of the late 1870s, "[t]he owners of many Middle Western railways, unable to meet fixed charges, had to call

in bankruptcy, the state protected the reorganized entity in its formative stages.<sup>52</sup> While somewhat difficult to establish authoritatively, the drafters of the NLGA must have been aware of the role played by railroad receiverships in the history of labor injunctions.<sup>53</sup> It is unimaginable that the drafters would have countenanced an exception to their new, broad anti-injunction statute, premised on the notion that courts could be trusted to engage in business reorganizations unencumbered, as a special case, even in the context of a labor dispute.<sup>54</sup>

On the contrary, the legislative history of the NLGA evinces a widespread, generalized congressional hostility to the federal judiciary that must not be forgotten when considering questions of legislative intent surrounding the NLGA.

### C. Judicial and Statutory Exceptions to the Act

In the seventy-seven year history of the NLGA the courts, but not Congress, have created three exceptions to the statute's anti-injunctive mandate,<sup>55</sup> all of which involve real or perceived conflicts with other labor statutes.<sup>56</sup> Under the first exception, federal courts may issue injunctions to compel unions and employers to comply with certain duties under the

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on the courts to take care of their properties through receivers; some were, others were not, able to profit by the receivership and reorganization proceedings and find themselves still in the drivers' seats at their conclusion."

<sup>52</sup> Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 Cornell L. Rev. 1420, 1422, n.3 ("Railroad receivership . . . was effectively a private deal enforced with the power of a federal district court . . .")

<sup>53</sup> After all, Felix Frankfurter, whose views on the connection between receiverships and injunctions have already been discussed, was co-draftsman of the NLGA itself. William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L. J. 165, 190 (2001).

<sup>54</sup> See Richard M. Seltzer & Thomas N. Ciantra, *The Return of Government by Injunction in Airline Bankruptcies*, 15 Am. Bankr. Inst. L. Rev. 499, 529 (2007) ("[n]o series of cases contributed more to the feeling that the federal courts abused their equity jurisdiction than those involving employees of railroads in equity receivership") [hereinafter *Government by Injunction*].

<sup>55</sup> One might also include the Court's opinion in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30 (1957). In that case it was held that a union could be enjoined from striking in defiance of a requirement under the Railway Labor Act to submit "minor" disputes, as defined by the statute, to a railroad adjustment board. As Justice Black noted in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 210-211 (1962), there is clear legislative history showing that Congress intended to forbid unions from striking in those circumstances when it amended the Railway Labor Act in 1934, in part to allow for creation of the adjustment board. *Id.* citing *Chicago River*, 353 U.S. at 30. In those circumstances, the argument that the NLGA blanket prohibition on injunctions has been explicitly rendered inoperable is obviously persuasive.

<sup>56</sup> No cases have been located in which a non-labor statute was found to confer authorization for federal courts to issue injunctions in labor disputes.

Railway Labor Act. Under the second exception, federal courts possess authority to issue injunctions to prevent unions from striking over grievances when a union and employer are contractually bound to arbitrate the grievance, and the employer is, in fact, prepared to proceed to arbitration. Under the third exception, federal court injunctions are explicitly authorized under the Labor Management Relations Act.<sup>57</sup>

The first exception holds that federal courts may issue injunctions to compel unions to adhere generally to duties under the Railway Labor Act. The rule was laid out just that broadly in the Supreme Court's 1971 opinion *Chicago and North Western Railway Co. v. United Transportation Union*.<sup>58</sup> Though the rule established in *Chicago and North Western* has been clearly accepted and is settled, the case was probably wrongly decided. The two primary cases upon which the Court relied for the general proposition that labor injunctions were permissible under the Railway Labor Act were far afield from traditional contests between certified unions and employers engaged in a labor dispute over terms and conditions of employment.

First, in *Virginian Railway Company v. System Federation No. 40*,<sup>59</sup> the underlying injunction had been issued to prevent an employer from continuing to deal with an uncertified union in lieu of the lawfully elected representative of its employees. The Court gave short shrift to the employer's argument that the NLGA prevented federal courts from issuing injunctions barring employers from recognizing unions other than those officially certified under the Railway Labor Act. The Court noted that the purpose of the NLGA, as set forth in Section 2, was that employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>60</sup>

Second, the Court's reliance on *Graham v. Brotherhood of Locomotive Fireman* was misplaced.<sup>61</sup> In *Graham*, the Court upheld an injunction that had been issued to nullify bargaining agreements between a "whites only" union and a group of southern railroads.<sup>62</sup> As the *Graham* Court carefully explained:

[T]he Norris-LaGuardia Act did not deprive federal courts of

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<sup>57</sup> See 29 U.S.C. §160(l). The injunction provisions were initially enacted under the 1947 Taft-Hartley Act, which is now incorporated in the Labor Management Relations Act.

<sup>58</sup> 402 U.S. 570 (1971)

<sup>59</sup> 402 U.S. at 581 *citing* 300 U.S. 515 (1937)

<sup>60</sup> *Id.* at 563

<sup>61</sup> 402 U.S. at 582 *citing* 338 U.S. 232 (1949)

<sup>62</sup> 338 U.S. at 233



jurisdiction to compel compliance with positive mandates of the Railway Labor Act . . . enacted for the benefit and protection within a particular field, of the same groups whose rights are preserved by the Norris-LaGuardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to 'turn the blade inward.'<sup>63</sup>

Thus, the essential rationale in both *Virginian Railway* and *Graham* was purely mechanical: the purpose of neither the NLGA nor the Railway Labor Act could be achieved unless employees had bona fide unions that did not discriminate against them on the basis of race, and unless employers were compelled to negotiate only with unions lawfully selected by employees. Judicial enforcement through injunction of the conditions precedent for the procedural operation of the Railway Labor Act was one thing. Judicial interference with the utilization of economic weapons -- strikes<sup>64</sup> and lockouts<sup>65</sup> -- which have been thought integral to American labor law,<sup>66</sup> was quite another. As Justice Brennan emphasized in his dissent in *Chicago & North Western*:

. . . [T]he underlying cohesiveness of the decisions lies in the fact that in each instance the scheme of the Railway Labor Act could not begin to work without judicial involvement. That is, unless the unions fairly represented all of their employees; unless the employer bargained with the certified representative of the employees; unless

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<sup>63</sup> 338 U.S. at 237 *citing generally* *Virginian Railway Company*, 300 U.S. 515

<sup>64</sup> There is no universally accepted definition of the term "strike," but for purposes of discussion this article will make use of the definition under the National Labor Relations Act, 29 U.S.C. § 142(2): "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees."

<sup>65</sup> In a lockout, which is in general a lawful economic weapon, an employer prevents employees from working, either because it anticipates that a strike is about to occur and wants to control the timing of the work stoppage, or to pressure the union to accept the employer's bargaining position during negotiations. *See* DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 630-33.

<sup>66</sup> The famous subsequent case laying out the policy is *N.L.R.B. v. Insurance Agents International Union*, 361 U.S. 477, 495 (1960). In that case, the Court made clear that the use of economic weapons during bargaining was not a violation of a party's statutory duty to bargain in good faith.

the status quo was maintained during the entire range of bargaining, the statutory mechanism could not hope to induce a negotiated settlement. In each case the judicial involvement was minimal and in keeping with the central theme of the Act-to bring about voluntary settlement. In each case the 'collective bargaining agents stepped outside their legal duties and violated the Act which called them into being . . . As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement. If self-help can now effectively be thwarted by injunction and by drawn-out court proceedings after the termination of the entire bargaining process, or worse, yet, at each step thereof, the threat of its use becomes impotent, indeed.<sup>67</sup>

There are well known limitations in divining congressional intent. It is nevertheless difficult to agree with the Court that the legislative history of the NLGA supports the contention that Congress anticipated that employers could obtain labor injunctions to force unions to comply with duties, broadly defined, under the Railway Labor Act.<sup>68</sup> For purposes of this

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<sup>67</sup> *Chicago & North West Railway Co. v. United Transportation Union*, 402 U.S. at 595 (Brennan, J., Dissenting Opinion).

<sup>68</sup> In its curt discussion of the NLGA's legislative history, for example, the Court omitted the statement of Rep. Steiwer, of Oregon, in connection with a case in which an injunction had been obtained under the Railway Labor Act. The Court focused on statements by Rep. Blaine vaguely suggesting that employees would continue to be able to obtain RLA injunctions to enforce employer compliance under that act notwithstanding passage of the NLGA as they had in the past. Rep. Steiwer promptly corrected this contention:

An effective answer can be made to the last suggestion in just one sentence. In the railway clerks' case there was no unlawful act; there was not even the threat of an unlawful act. The remedy sought by the employees was based merely upon a coercion by the employers and the denial of the employees' right to be represented by agents of their own choosing. If that right is asserted again in a court of the United States after the enactment of this bill the court cannot issue an injunction in their behalf, because the jurisdiction of the court will depend upon a finding that there is an unlawful act or the threat of an unlawful act, and the remedy provided or implied in the act of 1926, in my humble judgment, will be gone. 75 Cong. Rec. 4938.

Thus, Rep. Steiwer appeared to assume that federal courts' previously existing injunctive authority under Railway Labor Act would be undermined and perhaps eliminated altogether unless a party could make a threshold showing that unlawful acts had been or were about to be committed. The additional implication of his statement is that mere noncompliance with a statutory duty would not rise to the level of an unlawful act. Indeed, the debate during which Steiwer made the remark reflected broad congressional

discussion, however, it is adequate to say that the cautious use of such injunctions has been deemed necessary to preserve the design of the railway labor statute. At this point in the development of labor doctrine, congressional action would be necessary to alter the cases upholding the exception. Ultimately, as Professor Gould has put it, "where the RLA was involved, the Norris-LaGuardia hurdle was not too high for the Court to jump in order to enjoin a strike."<sup>69</sup>

The second judicially created exception to the NLGA is the rule that, where a union has agreed under a collective bargaining agreement not to strike, presumably in exchange for an employer's agreement to arbitrate employment disputes, the union ought to be held to its bargain, under the compulsion of federal injunction if necessary.<sup>70</sup> The exception was established in the Supreme Court's 1970 opinion in *Boys Markets, Inc. v. Retail Clerks Local 770*.<sup>71</sup> While also a well-established exception, the *Boys Market* exception was also probably wrongly decided, though to little effect in the face of congressional acquiescence. The problem with this additional departure from the no-injunction rule is that, despite the existence in 1932 of collective bargaining agreement no-strike pledges and grievance-arbitration provisions in collective bargaining agreements,<sup>72</sup> Congress failed to provide for such an exception, and the NLGA's legislative history provides not a hint that the 72nd Congress would have countenanced such a sweeping deviation from the statute.

As part of the 1947 Taft-Hartley amendments to the National Labor Relations Act, however, the Congress provided for breach of collective bargaining agreement actions in federal court.<sup>73</sup> By 1957, the Supreme

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concern that unions and employees would lose their apparent ability to compel by injunction employer compliance with the mandates of the Railway Labor Act. See 75 Cong. Rec.

<sup>69</sup> William B. Gould, *On Labor Injunctions, Unions and the Judges: The Boys Market Case*, 1970 Sup. Ct. Rev. 215, 220 (1970) [hereinafter *On Labor Injunctions*]

<sup>70</sup> Federal court jurisdiction is conferred in the first instance by Section 301 of the Labor Management Relations Act.

<sup>71</sup> 398 U.S. 235 (1970). This assumes, of course, that the employer also established the traditional equitable criteria -- that "breaches [of the collective bargaining agreement] are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." *Id.* at 255 *citing* *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (1962)

<sup>72</sup> See e.g. the labor agreement exemplar in WILLISTON ON CONTRACTS, Protocol Agreement between Cloak, Suit and Skirt Manufacturers' Protective Association and Various Labor Unions (1910) (Appendix? to §§ 1664-1656) available at <http://chestofbooks.com/business/law/Law-Of-Contracts-3/index.html> (last visited July 11, 2009).

<sup>73</sup> Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. § 185

Court had concluded, in *Textile Workers Union v. Lincoln Mills of Alabama*,<sup>74</sup> that creation of an action for breach of an employer's agreement to arbitrate employment disputes implied that federal courts could issue preliminary injunctions to compel arbitration in compliance with the agreement.<sup>75</sup> How could the NLGA be read to permit the issuance of such an injunction? According to the Court it was because "[t]he failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed."<sup>76</sup> Furthermore, Congress wanted to encourage the making of collective bargaining agreements with no-strike agreements and arbitration was the *quid pro quo* for such an agreement.<sup>77</sup>

Naturally enough, if an employer could be compelled by injunction to comply with its collectively bargained agreement to arbitrate employment disputes, the argument that unions could analogously be enjoined to comply with its no-strike pledge under the same agreement would not be long in coming.

Five years later, *Sinclair Refining v. Atkinson* presented the question.<sup>78</sup> In *Sinclair*, it was alleged that a union engaged in a series of work stoppages, during roughly a year and a half period, concerning a dispute that was arbitrable under the effective collective bargaining agreement between the union and the employer.<sup>79</sup> The employer sought an injunction to suspend the work stoppages and the accompanying picketing.<sup>80</sup> A federal district court in Indiana dismissed a motion for equitable relief on the theory that the NLGA forbade injunctions to issue in connection with the peaceful labor activity complained of, and the Seventh Circuit upheld the order of dismissal.<sup>81</sup>

In affirming the decision of the Seventh Circuit, Justice Black, writing for the majority, made two essential arguments. First, he contended that

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<sup>74</sup> 353 U.S. 448 (1957)

<sup>75</sup> *Id.* at 457-58.

<sup>76</sup> *Id.* The Court immediately acknowledged that its conclusion could not be squared with the text of the NLGA. *Id.*

<sup>77</sup> *Id.* at 453-55. Section 8 of the NLGA states that injunctions may not issue in favor of "any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." The Court read the section as a general endorsement of the voluntary settlement of labor disputes. *Id.* at 458. Of course, the argument is somewhat misplaced because it was the union not the employer seeking the injunction.

<sup>78</sup> 370 U.S. at 195; *see supra* at n.64

<sup>79</sup> *Id.* at 197

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 198

nothing in the language of Section 301 suggested a repeal of the NLGA.<sup>82</sup> The legislative history, moreover, showed that Congress had explicitly considered and rejected the notion, during the Taft-Hartley debates, whether those amendments would repeal the NLGA.<sup>83</sup>

Second, Justice Black argued that *Lincoln Mills* merely stood for the proposition that parties who had agreed under the terms of a collective bargaining agreement to submit grievances to arbitration could be compelled to do so. The Court had not held, according to Justice Black, that federal injunctions could issue to halt protected labor activity, nor, he argued, would it have been proper to do so in light of the "overwhelming evidence of a congressional intent to retain completely intact the anti-injunction prohibitions of the Norris-LaGuardia Act in suits brought under s 301."<sup>84</sup> For him, therefore, it was clear that, "[a]n injunction against work stoppages, peaceful picketing or the nonfraudulent encouraging of those activities would . . . prohibit the precise kinds of conduct which subsections (a), (e) and (i) of [§] 4 of the Norris-LaGuardia Act unequivocally say cannot be prohibited."<sup>85</sup>

*Boys Markets*, which in 1970 authorized issuance of federal court injunctions to suspend strikes over disputes concerning which the employer and union had agreed to arbitrate,<sup>86</sup> cannot to this day be persuasively reconciled with the Court's 1962 *Sinclair* opinion. Congress had not intervened in the eight year interval between the cases, and it is obvious that the Court had simply utilized "strong judicial creativity in the face of the plain meaning of Section 4 . . ."<sup>87</sup> Whatever one's views of the need for such judicial activism given the state of the law in 1970,<sup>88</sup> however, the

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<sup>82</sup> *Id.* at 204-205

<sup>83</sup> *Sinclair Refining*, 370 U.S. at 210.

<sup>84</sup> *Id.* at 210-212

<sup>85</sup> *Id.* at 212

<sup>86</sup> A subsequent refinement of the rule is that a federal court may not enjoin a strike in violation of a no-strike agreement where the underlying dispute is not covered by the applicable collective bargaining agreement. *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976) (holding that sympathy strike not enjoinable under the NLGA because underlying dispute concerned union and employer not in collective bargaining relationship and thus not arbitrable because no contract between parties). Thus, by 1976 the Court had begun to inch away from the theoretical outer boundary of the pro-arbitration position that, in effect, would have prevented unions from striking even in situations when arbitrations could not resolve the underlying dispute.

<sup>87</sup> See Archibald Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mtn L. Rev. 247, 256 (1957)

<sup>88</sup> Professor Atleson has argued that *Boys Market* rests on a shaky doctrinal foundation despite being a logical outgrowth of *Lincoln Mills* and the *Steelworkers Trilogy* (*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)) (establishing the centrality of arbitration to federal labor

exception was palpably devised paying the closest attention to the competing labor policies at play.

Unlike the situation under the Railway Labor Act and *Boys Market* exceptions to the NLGA, there is no question that Congress, in enacting the Taft-Hartley Act,<sup>89</sup> authorized and intended federal courts to issue injunctions in circumstances that the NLGA previously would have classified as unenjoinable labor disputes.<sup>90</sup> However, the authorization is limited to certain well-defined categories.<sup>91</sup> The best known of these categories is the secondary boycott,<sup>92</sup> but others also exist.<sup>93</sup> Taft-Hartley

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policy). Moreover, his critique continues, while unions may agree to no-strike provisions, they would typically not also agree to waive the protections of the NLGA. For Professor Atleson, *Boys Market* is ultimately explained by "freewheeling judicial policy making and not legislative intent . . ." See James B. Atleson, *The Circle of Boys Market: A Comment on Judicial Inventiveness*, 7 Indus. Rel. L. J. 88, 105-106 (1985) [hereinafter *Circle of Boys Market*]. Commentators such as Professors Gould and Cox, on the other hand, have seen in *Boys Market*, ". . . an exception [to Norris-LaGuardia] for strikes in breach of contract [that] would carry out fairly specific legislative enactment without inviting judicial determination of labor policy." See Gould, *On Labor Injunctions*, at 236 quoting Archibald Cox, *LAW AND THE NATIONAL LABOR POLICY*, 48-52 (1960). Whatever view one adopts, the debate arises in the context of whether the decision contributed to the formulation of a coherent labor policy. Assumed, sub silentio, was the existence of a strong union movement able to achieve collective bargaining agreements in the first instance. See e.g. Gould, *On Labor Injunctions* at 236.

That assumption has been seriously undermined for at least the last decade. See Catherine R. Fisk, Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, Louisiana L. Rev. (forthcoming) available at <http://ssrn.com/abstract=1410220> citing John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 1999- 2004 62 INDUS. & LAB. REL. REV. 3, 5 (2008) (between 1999 and 2004, of 8,155 newly-certified unions, 44 percent failed to secure a first contract within a year of certification); see also Kate Bronfenbrenner, *NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING*, EPI Briefing Paper # 235 (Washington, D.C.: Economic Policy Institute, May 20, 2009), p. 22 & Figure B, available at [http://epi.3cdn.net/edc3b3dc172dd1094f\\_0ym6ii96d.pdf](http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf) (analyzing a survey of NLRB elections from 1999-2003, 52 percent of newly certified unions have not secured a contract one year after election, 37 percent have no contract after two years, 30 percent have no contract after three years, and 25 percent have no contract more than 3 years post-election).

<sup>89</sup> For a penetrating account of the policy considerations underlying the Taft-Hartley Act see Archibald Cox, *Revision of the Taft-Hartley Act*, 55 W. Va. L. Rev. 91, 95-97 (1953).

<sup>90</sup> For a sympathetic account of the Taft-Hartley injunction provisions by the then General Counsel of the National Labor Relations Board see Robert N. Denham, *The Taft Hartley Act*, 20 Tenn. L. Rev. 168, 175-76 (1948) [hereinafter *Taft-Hartley*].

<sup>91</sup> The Taft-Hartley Act is an excellent example of Congress's ability to express a careful and precise authorization of labor injunctions when it actually intends to do so.

<sup>92</sup> The term secondary boycott refers to "[r]efusal to work for, purchase from or handle products of secondary employer with whom union has no dispute, with object of forcing such employer to stop doing business with primary employer with whom union has

actually inaugurated the present requirement that the General Counsel of the National Labor Relations Board, but not individuals, seek an injunction when an expedited investigation reveals that unions have engaged in certain types of proscribed conduct.<sup>94</sup>

Taken together, the Railway Labor Act, *Boys Markets*, and Taft-Hartley exceptions to the NLGA's anti-injunction provisions must be understood as a complex judicial and legislative enterprise to harmonize various federal labor laws into a coherent national labor policy.

D. A Brake on NLGA "Labor Policy" Exception:  
The *Burlington Northern* Case

The logic of the harmonization of federal labor law, if unconstrained, might have overwhelmed the anti-injunctive policy of the NLGA despite its statutory text. Analysts unfamiliar with the subtlety and history of the labor laws might be tempted to conclude that the federal courts in cases like *Boys Market* had simply abandoned the NLGA as "a statute for other times and other circumstances."<sup>95</sup>

The Supreme Court checked the potential for unbridled harmonization in its opinion in *Burlington Northern R. Co. v. Brotherhood of Maintenance*

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dispute." *C. Comella, Inc. v. United Farm Workers*, 33 Ohio App. 61, 72 (1972).

<sup>93</sup> See generally the current catalogue at 29 U.S.C. §158(b)(4). Indeed, one of the strongest arguments against the *Boys Market* outcome is that Congress, while hard at work about the business of establishing federal court injunctive authority as an aid to enforcement of newly devised union unfair labor practices, declined to explicitly relax the injunction prohibitions in Section 4 of the NLGA. At the same time, Congress did amend portions of Section 6 of the NLGA, and failed to accept a House provision that would have made Norris-LaGuardia inapplicable to Section 301. See Atleson, *Circle of Boys Market* at 93 citing H.R. Rep. No. 245, 80th Cong., 1st Sess. 46 (1947). It seems wholly inescapable that the *Boys Market* policy was entirely a judicial creation.

<sup>94</sup> See 29 U.S.C. §160(b)(1). As the NLRB General Counsel at the time described it, injunctions were required to be sought:

. . . where a labor organization has called a strike or has encouraged the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle, or to work on, any goods or commodities, or to perform any services, in order to force an employer to join some trade association or employer organization; Or, to force an employed person to join a labor organization; Or, to force any employer or other person to stop handling, using, or selling the products of some other producer or manufacturer, or to stop doing business with any other person; Or, where the object is to force an employer other than their own to recognize an uncertified labor organization as the representative of his employees; Or, to force an employer to recognize or bargain with some particular labor organization when his employees are already represented by a certified union . . . Denham, *Taft-Hartley* at 175.

<sup>95</sup> Haggard, *Apparent Conflict* at 740

*and Way Employees*.<sup>96</sup> In that case, the Court was presented with a golden opportunity to hasten abandonment of the NLGA, if that had been the intent of the federal judiciary. The union, the Brotherhood of Maintenance of Way Employees, represented railroad employees of the Maine Central Railroad and the Portland Terminal Company, subsidiaries of Guilford Transportation Industries.<sup>97</sup> Guilford owned two other railroads, the Delaware Hudson Railway Company, and the Boston and Maine Corporation.<sup>98</sup> The Guilford system, which operated in the northeastern United States, was relatively small, and the company relied on other railroads to carry much of its traffic.<sup>99</sup> The union and Guilford became embroiled in a dispute over a reduction in the work force.<sup>100</sup> The Railway Labor Act required the parties, as a matter of law, to engage in extensive negotiations in an attempt to resolve the dispute.<sup>101</sup> At the conclusion of the mandated negotiations, however, the union was free to strike, and it did so, beginning in March 1986.<sup>102</sup>

Up to this point, the labor dispute involved relatively standard issues under the Railway Labor Act. However, the union eventually determined the strike to be of only limited efficacy in impacting Guilford's operations. Accordingly, the union decided to widen the dispute, first by picketing other Guilford subsidiaries, and then by picketing unaffiliated railroad companies throughout the U.S. that were not involved in the dispute.<sup>103</sup> Eventually, several of these uninvolved companies, including Burlington Northern, obtained injunctions in a federal district court against the picketing.<sup>104</sup> That court acknowledged that Sections 1 and 4 of the NLGA would bar federal courts from issuing injunctions against secondary activity growing out of any labor dispute, but found the sections inapplicable because the dispute between the uninvolved companies and the union was not a "labor dispute" within the meaning of the NLGA.<sup>105</sup> The court reasoned that this was so because the uninvolved companies were not "aligned" with Guilford.<sup>106</sup> Alternatively, the district court ruled that it had jurisdiction to issue an

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<sup>96</sup> 481 U.S. 429

<sup>97</sup> *Id.* at 432

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 481 U.S. at 432.

<sup>103</sup> *Id.* at 433. According to the Court, the union erroneously believed some of these uninvolved companies to be assisting Guilford by lending them equipment and operating personnel.

<sup>104</sup> *Id.* at 434.

<sup>105</sup> *See supra* n.48.

<sup>106</sup> *Id.* at 434-35.



injunction because the union's activity violated the Interstate Commerce Act and was therefore "unlawful" within the meaning of the NLGA.<sup>107</sup>

On appeal, the Seventh Circuit rejected the district court's conclusion that the union's labor activity was subject to injunction because the activity was "unlawful,"<sup>108</sup> reasoning that,<sup>109</sup> "the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, non-labor statute."<sup>110</sup>

The Supreme Court, in addition to upholding the conclusions of the Seventh Circuit, focused its discussion on whether secondary picketing<sup>111</sup> was unlawful under the Railway Labor Act, agreeing with the Seventh Circuit's conclusion that it was not, and with the circuit's additional observation that federal courts would in any event be without jurisdiction to enjoin the picketing, even if it violated a non-labor statute.<sup>112</sup>

*Burlington Northern's* significance is that the Supreme Court refused to read an additional exception into the NLGA even when it could easily have done so. After all, argued the employer-petitioners,<sup>113</sup> amendments to the National Labor Relations Act in 1947 and 1959 had evinced an unmistakable congressional policy to outlaw secondary boycotts under that statute.<sup>114</sup> Given the silence of the Railway Labor Act respecting secondary

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<sup>107</sup> *Id.* at 435. It will be recalled that under Section 107 of the NLGA "unlawful" conduct subjects a labor dispute to injunction under tight procedural constraints. *See supra* n.27, 28 and accompanying text. The District Court made additional RLA-centered arguments in support of an injunction that have been omitted because they are not germane to the present discussion.

<sup>108</sup> *Id.*

<sup>109</sup> 793 F.2d 795, 800 (7th Cir. 1986)

<sup>110</sup> 481 U.S. at 435 *citing* *Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330, 339 (1960). This is important in considering whether the NLGA's ban on injunctions would be lifted because the conduct of the union was arguably subject to injunction under the Bankruptcy Code, another non-labor statute.

<sup>111</sup> Picketing is "secondary" when directed against employers who are "neutral" in a labor dispute. Secondary picketing is generally unlawful under the National Labor Relations Act. The Railway Labor Act, however, is silent with respect to secondary labor conduct. As the Seventh Circuit explained:

While the Railway Labor Act's processes continue, no one may use economic self-help. Those who violate this rule may be enjoined . . . Once these processes are over, and a strike has lawfully begun, the Norris-LaGuardia Act forbids resort to injunctions.

<sup>112</sup> 481 U.S. at 435.

<sup>113</sup> Petitioner's Brief at 33-34, 1986 WL 727879 (chronicling the legislative history of both the Taft-Hartley Act, and the later Labor Management Reporting and Disclosure Act of 1959, as expressing a desire to abolish the secondary boycott).

<sup>114</sup> In reality, however:

The NLRA does not contain a "sweeping prohibition" of secondary activity; instead it describes and condemns specific union conduct directed to specific

boycotts,<sup>115</sup> the general policy of that statute in seeking to avoid work stoppages,<sup>116</sup> and the apparent disdain of Congress for secondary boycotts generally, could not an injunction issue in the interest of harmonizing federal labor policy? The Court would not, however, go this far in the name of harmonization, rejecting the invitation (in language evocative of an earlier period):

Even if we were confident that our mixture of metaphysics and social policy, unlike that of our predecessors earlier in this century, would produce a construction of § 13(c) that would substantially align with Congress' contemporary views, the fact remains that Congress passed the Norris-LaGuardia Act to forestall judicial attempts to narrow labor's statutory protection.<sup>117</sup>

The contrast between Justice Brennan's *Burlington Northern* opinion in 1987 and his *Boys Market* opinion in 1970 is remarkable. In *Boys Market*, Justice Brennan had said:

As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones.<sup>118</sup>

Thus, in the 17-year interval between *Boys Market* and *Burlington*

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objectives . . . Moreover, the NLRA does not permit employers to seek injunctions against the activity that it does prohibit. It grants to the National Labor Relations Board (NLRB) exclusive authority to seek injunctions against some forms of secondary activity.

*Burlington Northern R. Co. v. Brotherhood of Maintenance and Way Employees*, 481 U.S. at 448 (internal citations omitted)

<sup>115</sup> *Id.* at 448-49

<sup>116</sup> *Id.* at 450

<sup>117</sup> *Id.* at 443. It had been argued that the union did not have a "labor dispute" within the meaning of Section 13(c) of the NLGA with the secondary employers because those employers were not substantially aligned with the primary employer. *Id.* at 440-41.

<sup>118</sup> *Boys Market, Inc. v. Retail Clerks Union Local 770*, 398 U.S. at 251.

*Northern*, Justice Brennan appeared to have abruptly changed position concerning the NLGA. In *Boys Market* he saw the NLGA as an older labor statute that had to be accommodated -- to its detriment -- with newer labor statutes. In *Burlington Northern*, however, he reassessed the NLGA as a directive of an earlier Congress that could not simply be disregarded.<sup>119</sup> This view was much more in line with his dissenting opinion in *Chicago & North West Railway*, which had articulated a position far less friendly to the notion of NLGA accommodation.<sup>120</sup>

The rationale for the change in the Court's tone in *Burlington Northern* provides at least some sense as to how federal courts might evaluate conflicts between the NLGA and non-labor statutes, including the Bankruptcy Code. Commentators evaluating the NLGA as anachronistic, or at least not well harmonized, have often pointed to either the strength of labor unions compared to the early 1930s, or to the judiciary's successes in building a national labor system founded on arbitration instead of the utilization by unions and employers of economic weapons like strikes and lockouts.<sup>121</sup> The *Burlington Northern* case may one day be seen as a harbinger of the view that those rationales for relaxing the NLGA, to the extent they were in fact controlling,<sup>122</sup> have themselves become anachronistic.

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<sup>119</sup> This is not to suggest that *Burlington Northern* has completely resolved the question of federal injunctions in Railway Labor Act secondary boycott scenarios, however. Courts have, for example, issued injunctions against sympathy strikes of a secondary employer when a striking union had an explicit no-strike agreement with the primary employer; and have also issued injunctions on the theory that a union striking against a secondary employer was embroiled in a "minor dispute," triggering mandatory statutory pre-strike negotiation. See Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 Stan. L. Rev. 1485, 1486 n.6 (1990).

<sup>120</sup> See generally *supra* n.73 and accompanying text.

<sup>121</sup> For an extremely articulate argument along these lines see Gould, *On Labor Injunctions* at 236 (arguing that exceptions to the NLGA were justifiable because of the improved position of unions in the United States); see also William C. Campbell II., Statute Note, Section 6 of the *Norris-LaGuardia Act: A Statute Whose Time Has Come and Gone*, 3 Geo. Mason U. L. Rev. 207, 209 (1980) (arguing that Norris-LaGuardia less necessary because congressional emphasis has shifted from "protection of the unions to the encouragement of collective bargaining as a means of peaceful resolution of labor disputes"); Poe, *Bankruptcy Court's Dilemma*, at 327-28 ("With the rise of organized labor, congressional labor policy concerns have moved gradually away from protecting workers and preserving the integrity of the federal judiciary, and have moved toward encouraging the use of arbitration and other procedures that insure the quick resolution of labor disputes and the maintenance of industrial peace"); Haggard, *Apparent Conflict* at 740 (arguing that the NLGA is "a historical anomaly and an anachronism")

<sup>122</sup> *Boys Markets*, *supra* n.127 and accompanying text;

## II. POTENTIAL FOR CONFLICT BETWEEN NLGA ANTI-INJUNCTIVE PROVISIONS AND BANKRUPTCY INJUNCTIONS

In order for the NLGA's anti-injunction provisions to conflict with the Bankruptcy Code, the Code would have to authorize injunctions with the capacity for interfering with or suspending NLGA-protected conduct.<sup>123</sup>

### A. Bankruptcy Code Injunctions

The Bankruptcy Code possesses two types of injunctive vehicles with the potential for conflicting with the NLGA, the "automatic stay," and a broad, traditional injunctive provision under section 105 of the Code.

#### 1. *The Automatic Stay*

The automatic stay provision of Section 362(a) of the Bankruptcy Reform Act of 1978, applicable to most bankruptcies, automatically attaches upon the filing of a bankruptcy petition, and forbids creditors from unilaterally initiating post-petition debt recovery actions in eight separate categories.<sup>124</sup> Section 362(b), in turn, sets forth specific exceptions to the

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<sup>123</sup> The NLGA does not explicitly define the term "injunction." It states without additional explanation, in Section 101 of the Act, that "[n]o court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of [the NLGA]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in [the NLGA]." Bankruptcy courts are exclusively federal, *In re Lowenbraun*, 453 F.3d 314, 322 (6th Cir. 2006) ("Congress intended for the Code to be comprehensive and for the federal courts to have exclusive jurisdiction over bankruptcy matters"), so any Code injunction would be issued by a "court of the United States."

<sup>124</sup> The automatic stay operates as an immediate stay of: the commencement or continuation of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the case's commencement, or to recover a claim against the debtor that arose before the commencement of the case; the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case; any act to obtain possession of property of the estate or of property from the estate; any act to create, perfect, or enforce any lien against property of the estate; any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case; any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case; the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor. 11 U.S.C. §362(a) (1)-(8).

stay.<sup>125</sup> Assuming for the sake of argument that NLGA-protected conduct fell within the ambit of Section 362(a), the question is whether an automatic stay is an injunction within the meaning of the NLGA. If the stay is an injunction, conflict with the NLGA arises arguably the moment it attaches. If, on the other hand, the stay is not an injunction, the NLGA is simply inapplicable.

Professor Haggard has argued that, because the automatic stay is self-enforcing, the anti-injunction provisions of the NLGA do not come into play.<sup>126</sup> This has surface appeal. Because a plaintiff does not initiate the stay, no federal court is required to respond to a prayer for equitable relief, and there is no corresponding need for the kind of equitable proceeding eschewed by the architects of the NLGA. However, this theory contains at least two problems.

First, as Justice Alito explained in a different context, both statutes and judicial opinions have used the terms "stay" and "injunction" almost interchangeably.<sup>127</sup> This interchangeability, which has extended to the bankruptcy context,<sup>128</sup> coupled with the NLGA's inclusion of the imprecise term "restraining orders"<sup>129</sup> in the short list of proscribed equitable remedies, makes it difficult to rely solely on the NLGA's text for a resolution of the issue.<sup>130</sup> Thus, as an interpretive matter Professor

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<sup>125</sup> The filing of a bankruptcy petition does not operate as a stay of the commencement or continuation of a criminal action or proceeding against a debtor or of the commencement or continuation of a civil action or proceeding for the establishment of paternity; the establishment or modification of an order for domestic support obligations; concerning child custody or visitation; for the dissolution of a marriage except concerning the division of property that is property of the estate; regarding domestic violence; of the collection of a domestic support obligation from property that is not property of the estate; with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute; of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law; of the reporting of overdue support owed by a parent to any consumer reporting agency; of the interception of a tax refund; or of the enforcement of a medical obligation, as specified under the Social Security Act. 11 U.S.C. §§362(b)(1) and 362(b)(2)(A)-(G).

<sup>126</sup> Haggard, *Apparent Conflict* at 719 and n.98 citing *In re Tom Powell & Son, Inc.*, 22 B.R. 657 (Bankr. W.D. Mo. 1982).

<sup>127</sup> *Nken v. Holder*, -- U.S. --, 129 S.Ct. 1749, 1766 (2009) (Alito, J., Dissenting)

<sup>128</sup> *Jove Eng'g Inc. v. I.R.S.*, 92 F.3d 1539, 1546 (11th Cir. 1996) (describing automatic stay as "essentially a court ordered injunction")

<sup>129</sup> See *U.S. v. DBB, Inc.*, 180 F.3d 1277, 1281-82 (11th Cir. 1999) (discussing possible definitions of term "restraining order" which "could refer either to a temporary restraining order or, more generally, to other forms of injunctive relief")

<sup>130</sup> Courts have at best glossed the issue, possibly because the parties before them have been confused about which injunctive procedure to pursue. In the underlying bankruptcy proceeding in *Petrusch*, for example, the employer-debtor sought a preliminary injunction against union picketing, under Section 105 of the Code, at the same time the bankruptcy

Haggard's argument fails because without contextual legislative or judicial definition it is necessary to conclude that a stay is equivalent to an injunction.

Second, the automatic stay is not really self-enforcing in the way that Professor Haggard suggests. "Enforcement" means to "constrain," "compel" or "carry out effectively."<sup>131</sup> But enforcement is not automatic; an actor is presumed. A violation of the stay is a contempt of court subjecting the violator to potentially severe sanction<sup>132</sup> *if* the court is informed of the alleged violation. When (and if) the court is so informed, a finding of contempt may follow. The situation is barely distinguishable from the need for a party to notify a court that an injunction has been violated:<sup>133</sup> a court grants an injunction; an alleged violation of the injunction generates a hearing;<sup>134</sup> a finding of violation results in sanctions.<sup>135</sup> Neither the sanction for violation of an injunction nor the imposition of penalties for violation of an automatic stay is self-enforcing.

In reality, an automatic stay is a recent statutory version of the historical *in rem* injunction, an instantly attaching court order that "the whole world"

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judge signed an order for the union to show cause why it should not be held in contempt for violating the Section 362 automatic stay. 14 B.R. 825, 827. The injunction was granted, and in the preliminary hearing that followed the parties appeared genuinely confused about what action was to be argued. *Id.* at 825, n.1. Because the preliminary injunction was granted, there was no occasion to discuss the whether the automatic stay fell within NLGA, since the §105 injunction obviously did. The bankruptcy court in *Tom Powell, Inc.*, 22 B.R. 657, had before it a case arising solely under Section 362 when it issued a show cause order in connection with a strike without an accompanying injunction. *Id.* While distinguishing the case from prior similar cases in which injunctions had issued, *Id.* at 660, the court did not explicitly consider whether an automatic stay was an NLGA injunction. The court proceeded to balance of "the policy considerations underlying the prohibitions against self-help and preferences contained in the Code against the anti-injunction provisions of the Norris-LaGuardia Act," ultimately finding it unnecessary to choose between the policies because the union had not had actual notice of the stay. *Id.*

<sup>131</sup>MERRIAM WEBSTER'S ONLINE DICTIONARY available at <http://www.merriam-webster.com/dictionary/enforcement> (last visited August 10, 2009).

<sup>132</sup>*In re Skinner*, 917 F.2d 444 (10th Cir. 1990). While it is true that a debtor must prove a willful violation of the stay to establish entitlement to damages, *see Tom Powell & Son, Inc. v. 22 B.R. 657*, willfulness means acting in violation of the stay with knowledge that a bankruptcy petition has been filed, not that a creditor intended to violate the stay. *In re Atlantic Business and Community Corp.*, 901 F.2d 325, 329 (3d Cir. 1990). Willful violations of the automatic stay require a court to award compensatory damages, including costs and attorneys fees, and authorize a court to award, in appropriate cases, punitive damages. *Id.* at 328 citing 11 U.S.C. §362(h).

<sup>133</sup>"Any *in personam* order that is enforceable by contempt power is an injunctive order . . . Even the automatic stay in bankruptcy operates like an injunction." DAN B. DOBBS, *THE LAW OF REMEDIES* 162 (West Publishing Co. 2nd ed. 1993).

<sup>134</sup>*See generally* Fed. R. Bankrpt. P. 9014

<sup>135</sup>*See generally* Fed. R. Bankrpt. P. 9020

may not interfere with property that is in the custody of a court.<sup>136</sup> *In rem* injunctions outside of the bankruptcy context, though probably constitutionally permissible,<sup>137</sup> have met with continuous and fundamental criticism for failing to provide actual notice to alleged violators of a contempt proceeding, and for, in effect, delegating to courts of equity the power to make criminal law.<sup>138</sup>

Within the bankruptcy context, the restraint of the automatic stay is imposed instantly, without hearing, and the burden is in effect shifted to the alleged contemnor to establish that the stay should not have been imposed.<sup>139</sup> The automatic stay is arguably more restrictive than an injunction, for there is no opportunity to argue that it should not be imposed. In practical effect it is a legislatively devised *ex parte* injunction.

The legislative history of the NLGA does not reveal any discussion of whether an automatic stay qualifies as an "injunction" or a "restraining order;" it does not discuss the automatic stay at all. This is hardly surprising since the automatic stay, as it presently exists, had not been created in the early 1930s.<sup>140</sup> Nevertheless, it is difficult to accept that a legislature with the "federal judges out" outlook of the 72nd Congress would have excluded such a sweeping instrumentality from the anti-injunction provisions of the

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<sup>136</sup> DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 837-38 (Aspen Publishers, 3d. ed. 2002).

<sup>137</sup> *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 692 n.32 (1978)

<sup>138</sup> Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 Tex. L. Rev. 873, 911-13 (1975).

<sup>139</sup> 11 U.S.C. §362(d): "On request of a party in interest and after notice and a hearing the court shall grant relief" for three statutory reasons, including a broad, "for cause" safe-haven in subsection 1. One nettlesome problem is how to define "party in interest." At least one Federal Circuit has narrowly defined a "party in interest" subject to relief from an automatic stay as a creditor entitled to a cash distribution from the bankruptcy estate. *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d. Cir. 1983). It is not clear whether a union representing employees would satisfy this definition and, if it would not, how it could gain relief from a stay. Automatic stay litigation is expedited and courts are expected to hear and decide issues within 30 days of a request for relief from the stay. 3 COLLIER ON BANKRUPTCY 362-109 (Alan N. Resnick & Henry J. Summer, eds., Matthew Bender & Co. 2004).

<sup>140</sup> The first statutory automatic stay of any variety was designed "to protect farmers with respect to secured debt." Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. Mich. J. L. Reform 175, 179 (1978). [hereinafter, *Automatic Stay I*]. The subsequent history of the stay involves a patchwork of provisions found in various statutory enactments and sections of judicial Codes. An automatic stay applying broadly across the bankruptcy statute did not make its appearance until the broad bankruptcy revisions culminating in the 1978 Act. Frank R. Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. Mich. J. L. Reform 1, 4-5 (1978) [hereinafter *Automatic Stay II*] (discussing the policy underpinnings of the stay and its historical evolution).

NLGA.<sup>141</sup>

The argument that an automatic stay is not an injunction within the meaning of the NLGA does not, therefore, withstand scrutiny.

## 2. *Section 105 Injunctions*

Assessing the other major injunctive provision of the Bankruptcy Code presents no similar difficulty. Section 105 states in relevant part:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.<sup>142</sup>

This is clearly a broad equitable provision that, unlike the automatic stay, is enabled only upon application to a federal court. The extent of the breadth of §105 has been a subject occasioning debate. Two schools of thought compete in this regard.<sup>143</sup> One view, drawing on the statutory language, holds that Section 105 is limited to carrying out the provisions of the Code.<sup>144</sup> Another view holds that courts may apply a liberal reading of the section, and are authorized to independently identify objectives of the entire Code, and to take all necessary actions consistent with those objectives.<sup>145</sup> The latter view obviously carries the greatest potential for

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<sup>141</sup> In any event, the authority for judicial injunction or attachment of a debtor's property upon the filing of a bankruptcy petition did exist and had since at least the early part of the 20th century. *Mueller v. Nugent*, 184 U.S. 1, 14 (1902). Whether Congress knew this is, of course, difficult or impossible to know. But that is precisely why the complete divestiture is dramatic. As if to hammer home the point

<sup>142</sup> 11 U.S.C. §105(a)

<sup>143</sup> For discussions bringing great clarity of exposition of these views see Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 *Emory Bankr. Dev. J.* 13, 37-41 (2006); Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power under Section 105 of the Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 *Ariz. St. L. J.* 793, 802-804 (2003) [hereinafter *Resisting the Expansion of Bankruptcy Court Power*].

<sup>144</sup> See e.g. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (explaining that the equitable powers possessed by a bankruptcy court do not extend beyond the express provisions of the Code).

<sup>145</sup> Bogart, *Resisting the Expansion of Bankruptcy Court Power* at 802.



engendering conflict with the NLGA. A bankruptcy court holding the view would presumably deem itself more at liberty to balance the equities in a post-bankruptcy petition labor dispute in favor of bankruptcy policies.

### B. Conflict Triggers

Accordingly, the injunctive provisions of the Code carry the structural potential for conflicting with the NLGA's anti-injunctive mandate. The question remains, however, whether labor-factual situations could actually trigger conflict with the Code.<sup>146</sup> Various scenarios raising the conflict seem plausible.

For example, if, after a bankruptcy petition has been filed, employees peacefully picket, strike, or leaflet their bankrupt employer to protest some aspect of their employment relationship, they may be engaging in an "act to obtain possession of property of the estate or of property from the [employer],"<sup>147</sup> or in an "act to collect, assess, or recover a claim against the [employer] that arose before the commencement of the case . . ."<sup>148</sup> triggering an arguable breach of the automatic stay.

Imagine a second example in which employees of a bankrupt employer engage in a post-petition strike, picketing, or leafleting for a pay raise. The raise may not have been agreed to by the employer, or even discussed by the parties, prior to the filing of the petition. In those circumstances, the labor activity might be viewed as an "act to obtain possession of property . . .," within the meaning of Section 362(a)(3).<sup>149</sup> On the other hand, the employer might have promised the union prior to the filing of the petition that it would provide a raise, within a collective bargaining agreement or otherwise, in which case striking or picketing to obtain the raise might be deemed by a bankruptcy court an "act to collect . . . a claim . . . that arose before the commencement of the case . . ."<sup>150</sup>

Some disputes may be even more purely contractual in nature. For example, a bankrupt employer might refuse to make contributions to employee benefit funds that were required under the collective bargaining

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<sup>146</sup> It might, of course, be argued that underlying bankruptcy violations render attendant peaceful labor activity "unlawful" such that the NLGA itself would authorize injunctive relief, with procedural restrictions. 29 U.S.C. §107(a). However, as previously stated, conduct is not unlawful, within the meaning of the NLGA, simply because it violates another non-labor statute. *Burlington Northern*, 481 U.S. at 435; *see also* *Crowe & Associates, Inc. v. Bricklayers and Masons Union Local No. 2*, 713 F.2d at 214

<sup>147</sup> 11 U.S.C.A. 362(a)(3).

<sup>148</sup> 11 U.S.C. §362(a)(6)

<sup>149</sup> *See supra* n.124.

<sup>150</sup> *Id.*

agreement in effect when the bankruptcy petition was filed.<sup>151</sup> As in the case of the hypothetical raise that was not provided, a strike or picketing to compel the contributions might even more persuasively be deemed "an act to collect . . . a claim . . . that arose before the commencement of the case. . ."<sup>152</sup>

How could peaceful labor activity such as strikes and picketing fit within the Code in these ways? First, the Code defines property very broadly,<sup>153</sup> and "[t]he stay applies to tangible and intangible property."<sup>154</sup> A raise would have to be paid out of the debtor's "property." Second, an "act to obtain possession of" or to "exercise control of" property<sup>155</sup> can consist of seemingly innocuous conduct. For example, telephone calls and letters merely requesting payment from a debtor have been found sufficient "harassment" to violate the automatic stay.<sup>156</sup> The heated atmosphere of a labor dispute would not, of course, mesh well with such gentility.<sup>157</sup> Picketers shouting, screaming, and cursing, while demanding a raise in pay, could well be deemed to be engaging in prohibited "acts" under court interpretations of the Code. A strike with the same aim also seems to fit within the expansive definition of "acts."<sup>158</sup>

Similar considerations apply with respect to an "act to collect . . . a claim . . . that arose before the commencement of the case . . ."<sup>159</sup> The definitional breadth of "act" has already been discussed. The Code's

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<sup>151</sup> See *Crowe & Associates, Inc. v. Bricklayers and Masons Union Local No. 2*, 713 F.2d 211 (striking during bankruptcy over delinquent contribution to employee benefit funds); *Petrusch v Teamsters Local 317*, 667 F.2d 297 (picketing during bankruptcy over delinquent contribution to employee benefit funds)

<sup>152</sup> 11 U.S.C. §362(a)(6)

<sup>153</sup> See 11 U.S.C. §541(1): "The commencement of a case . . . creates an estate . . . comprised of all legal or equitable interests of the debtor in property as of the commencement of the case." It is interesting to note that pre-petition amounts withheld by an employer from employees' wages, or received by an employer directly from employees, to make contributions to employee benefit plans, deferred compensation plans, certain tax deferred annuities and certain health plans are not "property" within the meaning of §541. 11 U.S.C. §541(b)(7)(A) and (B).

<sup>154</sup> 3 COLLIER ON BANKRUPTCY 362-21

<sup>155</sup> 11 U.S.C. §362(a)(3)

<sup>156</sup> 3 COLLIER ON BANKRUPTCY at 362-33

<sup>157</sup> "[F]ederal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974).

<sup>158</sup> Prohibited under §362(a)(3) are acts to obtain *any* property owned by the debtor, not simply property that was owned or in the possession of the debtor when the petition was filed, and that has consequently become part of the bankruptcy estate. 3 COLLIER ON BANKRUPTCY 362-20

<sup>159</sup> 11 U.S.C. §362(a)(6)

definition of “claim” is equally broad. Under the Code a “claim” is defined as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . .”<sup>160</sup> Thus, employees asserting a “claim” for an employer’s compliance with its pre-petition promises by the “act” of striking, picketing, or engaging in any other peaceful labor conduct could run afoul of this standard.<sup>161</sup>

### III. EVALUATION OF THE INTERPLAY BETWEEN THE NLGA AND BANKRUPTCY INJUNCTIONS

An overall evaluation of the interplay between the NLGA’s anti-injunction mandates and Bankruptcy Code injunctions will first assess judicial treatment of the doctrinal intersection. Beyond what the judges have had to say in the context of statutory construction, a more robust consideration of policy questions will be undertaken. First, the full scope of NLGA policies will be taken into account. Second, the extent to which bankruptcy injunctions’ interference with labor protest could impinge on employees’ First Amendment rights will be considered. Finally, real differences between labor and bankruptcy policies respecting the possible injury to reorganizing entities will be explicitly explored.

#### A. Judicial Precedent and Statutory Construction

The Circuit Courts that have considered whether bankruptcy courts may issue injunctions against peaceful labor activity during post-bankruptcy petition labor disputes have uniformly concluded that they may not.<sup>162</sup> Of the non-Railway Labor Act bankruptcy cases decided in the circuits, none appear to have held that an automatic stay or Section 105 injunction could supersede the injunctive strictures of the NLGA.<sup>163</sup> The courts’ rationales for coming to the conclusion, taken together, have been somewhat reflexive

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<sup>160</sup> 11 U.S.C. §101(5)(A)

<sup>161</sup> It is unclear whether a union could, as a matter of law, assert a “pre-petition claim” concerning a term or condition of employment formerly covered by a collective bargaining agreement subsequently rejected pursuant to 11 U.S.C. §1113. Presumably, the pre-petition nature of the claim would have been extinguished by operation of law.

<sup>162</sup> *Elsinore Shore Associates vs. Local 54, Hotel Employees and Restaurant Employees International Union*, 820 F.2d 62; *Briggs Transportation Co. v. International Brotherhood of Teamsters*, 739 F.2d 341; *Crowe & Associates, Inc. v. Bricklayers and Masons Union Local No. 2*, 713 F.2d 211; *Petrusch v Teamsters Local 317*, 667 F.2d 297.

<sup>163</sup> A number of bankruptcy courts appear to have reached the conclusion, however. See in particular *Tom Powell & Son*, 22 B.R. 657 and the underlying bankruptcy proceedings in *Crowe and Petrusch*, *supra*; see also Lowndes, *Workers’ Rights* at 547-48.

and sparse in policy justification.

The primary argument advanced is that Congress, in establishing the automatic stay provision of the Code in 1978, would not have repealed the NLGA *sub silentio*. The counterargument is that Congress, in setting out exceptions to the same provision, failed to explicitly except conduct protected by the NLGA. The question is whether Congress, in failing to expressly exclude peaceful labor conduct from the coverage of the automatic stay, impliedly repealed the anti-injunctive provisions of the NLGA upon attachment of the stay. The courts answer no, but provide little explanation.

In *National Association of Homebuilders v. Defenders of Wildlife*,<sup>164</sup> the Supreme Court restated its general test for determining when a later-enacted statute, such as the automatic stay provision of the Code, has "impliedly repealed" an earlier statute, like the NLGA.<sup>165</sup> The Court said:

While a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest . . . We will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all.<sup>166</sup>

Unquestionably, the reviewing federal circuits have explicitly addressed the absence of a "clear and manifest" legislative intention to repeal the anti-injunctive provisions of the NLGA. They have failed to complete the analysis, however, by explaining that it is not necessary to construe the automatic stay provision as overriding the NLGA "in order that the later statute shall have any meaning at all." The circuit courts in these cases have also underemphasized the fact that a rule under the prior bankruptcy law, holding that a bankruptcy court could not be utilized to enjoin peaceful labor activity, was well established prior to enactment of the Code in

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<sup>164</sup> 551 U.S. 644 (2007).

<sup>165</sup> The statutory provisions in question were § 402(b) of the Clean Water Act, which required the Environmental Protection Agency to issue a "transfer application" once nine statutory predicates had been satisfied, and § 7(a)(2) of the Endangered Species Act which authorized the EPA not to issue such an application unless it was not likely to jeopardize endangered or threatened species or their habitats. *Id.* at 662. The issue was whether the 1973 Endangered Species Act had impliedly repealed or amended the 1972 Clean Water Act by adding a tenth predicate. *Id.*

<sup>166</sup> *Id.* (internal quotations omitted).

1978.<sup>167</sup> Congress took no explicit action to overturn the rule in the 1978 Code.<sup>168</sup>

Still, at least one circuit court has suggested that Congress never considered the idea of conflict between the NLGA and the automatic stay.<sup>169</sup> While, if true, this would mean that Congress had no intent to repeal any portion of the NLGA, it would also raise the question of what, if anything, Congress might have done had it considered issues of statutory conflict. The court's suggestion also reflects that some judges may not yet feel precluded from assessing questions of conflict between the statutory regimes. As a bankruptcy court in this frame of mind stated:

It may well be that Congress simply did not consider the relationship between the two statutes . . . Where the activity is intended to collect a debt arising out of contract as opposed to an effort to vindicate statutory rights, outright abdication of jurisdiction seems inappropriate. There should be a balancing of the policy considerations underlying the prohibitions against self-help and preferences contained in the Code against the anti-injunction provisions of the Norris-LaGuardia Act.<sup>170</sup>

Since the 1980s was the last time when the question was considered in any detail, the passage of time may also contribute to a sense of license to engage in "balancing," notwithstanding the apparent nonexistence of implied repeal.

At all events, the foregoing discussion of statutory construction may itself be somewhat simplistic. Despite Professor Haggard's palpable irritation at the "emotional bias" judges have continued to afford the NLGA,<sup>171</sup> there is a good meta-rationale for courts to reflect profoundly before intruding on the mandates of the statute. The NLGA has been

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<sup>167</sup> *Truck Local No. 807 v. Bohack*, 541 F.2d 312 (2nd Cir. 1976); *In re Third Ave. Transit Corp.*, 192 F.2d 971 (2nd Cir. 1951); *Anderson v. Bigelow*, 130 F.2d 460 (9th Cir. 1942); *Teamsters Local No. 886 v. Quick Charge*, 168 F.2d 513 (10th Cir. 1948).

<sup>168</sup> A development post-dating these factors adds additional weight to this argument. When Congress amended the Code in 1984 to change the collective bargaining agreement rejection rules, *see infra* n.209 and accompanying text, it failed to also amend the automatic stay provision to explicitly apply to conduct attendant to labor disputes. As Professor Craver has persuasively argued, this is powerful evidence that Congress has not intended the automatic stay to apply to this conduct. *See Craver, Impact of Financial Crises* at 506-507.

<sup>169</sup> *Crowe & Associates*, 713 F.2d at 215.

<sup>170</sup> *In re Tom Powell*, 22 B.R. at 660

<sup>171</sup> Haggard, *Apparent Conflict* at 726,

described as a New Deal super-statute, meant to eclipse all in its wake, and embodying a "public culture optimistic about the operation of government creating statutes conducing toward the public good."<sup>172</sup> As the complicated judicial history of the NLGA reveals, judges have been hard-pressed not to recognize the NLGA as a statute that "successfully penetrate[d] public and normative culture in a deep way."<sup>173</sup> Courts have only with the greatest care found implied repeals of statutes of this nature,<sup>174</sup> and typically only under the pressure of some truly compelling public exigency.<sup>175</sup>

The NLGA occupies super-statute status because it established a dramatically new federal labor policy,<sup>176</sup> subsequently effectuated<sup>177</sup> in positive law,<sup>178</sup> and at the time of its enactment enjoyed broad public support after a long period of social deliberation. Indeed, the public debated the NLGA for 14 years,<sup>179</sup> and the bill passed almost as decisively

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<sup>172</sup> See William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 Duke L. J. 1215, 1229 (2001).

<sup>173</sup> *Id.* at 1215.

<sup>174</sup> *Id.* at 1251-52 (arguing that super-statutes often afforded "super-strong" deference because courts assume that constructions are likely to attract the attention of Congress and to be overridden if they "misread the statute in light of its principle.")

<sup>175</sup> See e.g. *United States v. United Mineworkers of America*, 330 U.S. 258 (1947) (holding that Norris-LaGuardia Act did not apply to the federal government in seizing and operating coal mines because relationship between government and workers of the seized mines was that of governmental employer enjoying sovereign immunity and employee).

<sup>176</sup> 29 U.S.C. §102: "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he 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 . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

<sup>177</sup> Though it is often contended that Congress shifted from a laissez-faire to a "legal" framework, during the three-year interval between the enactment of the NLGA and the Wagner Act, the more salient point may be that labor injunctions were not authorized under the legal/regulatory framework of the Wagner Act. In this respect, the non-involvement of the courts during the critical early phases of labor disputes was maintained.

<sup>178</sup> 29 U.S.C. §157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

<sup>179</sup> "For 14 years economic forces have blocked the passage of this legislation, but I

as the Declaration of War after Pearl Harbor.<sup>180</sup> The vote in the Senate was 75-5 and 362-14 in the House.<sup>181</sup> Analysis of debate transpiring during the enactment of the statute may leave the erroneous impression that the NLGA was debatable in a broader social sense. It was not.

Investing the Code's automatic stay with the same sense of the super-statute is difficult. Court rules of bankruptcy procedure had already formally established automatic stay practice during the years 1973-1976.<sup>182</sup> The codification of the automatic stay in 1978 appears to have been undertaken primarily to alleviate the perception by secured creditors that the court rules were arcane and unpredictable.<sup>183</sup> Inasmuch as the breadth of the NLGA was well established in 1978, and had already been found in the bankruptcy context as not authorizing federal court injunctive relief,<sup>184</sup> the "no-injunction rule" appears to have been part of the background law. Accordingly, "it is difficult to justify the position that the bankruptcy courts should provide an *automatic* shelter from the enforcement of laws that persons other than debtors in Title 11 cases are required to observe."<sup>185</sup>

B. Arbitration System and "Other Mutual Aid or Protection"

One argument for allowing the automatic stay to operate as an exception to the NLGA's anti-injunctive provisions is that courts have previously permitted exceptions for good policy reasons. This argument is unsound for two reasons. First, it reads far too much breadth into the *Boys Markets* exception.<sup>186</sup> Second, it fails to recognize that *Boys Markets* speaks to only one of the core values protected by the NLGA.

This article's earlier discussion of the *Boys Markets* exception underscored its essential contextual origins as a defense of the labor arbitration system. Non-bankruptcy courts in the bankruptcy context have generally recognized the limits of the exception.<sup>187</sup>

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believe that it has behind it today the imponderable force of a public opinion that will no longer be denied. Let us adopt this rule and pass this legislation, thereby assuring the great masses of our working people that here in this House privilege has no place, justice is being done, and the old ideals of democracy still survive." [Applause.] Statement of Rep. Nelson, 75 Cong. Rec. 5468.

<sup>180</sup> Jon R. Kerian, *Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act*, 37 N. D. L. Rev. 49, 49.

<sup>181</sup> *Id.*

<sup>182</sup> Kennedy, *Automatic Stay II*, at 4.

<sup>183</sup> *Id.* at 8-10.

<sup>184</sup> See *supra* n.167 and accompanying text.

<sup>185</sup> Kennedy, *Automatic Stay II*, at 64 (emphasis supplied)

<sup>186</sup> See Haggard, *Apparent Conflict* at

<sup>187</sup> See e.g. Crowe at 215, Bohack at 317-18.

In more recent decisions, Federal circuit courts outside of the bankruptcy context have also begun to reflect a keener sense of this contextualization, and to prevent the *Boys Markets* exception from expanding to disputes only remotely touching on the arbitration system.

In *AT&T Broadband v. International Brotherhood of Electrical Workers*,<sup>188</sup> for example, Judge Easterbrook discussed a proposed exception to the NLGA. In that case, AT&T contended that it was not obligated to arbitrate an employment dispute that the union argued was arbitrable, and sought an injunction to prevent the arbitration from going forward.<sup>189</sup> After quickly rejecting the arguably spurious assertion that arbitration itself was not a statutory labor dispute,<sup>190</sup> Judge Easterbrook cogently articulated the implications of AT&T's request for yet another exception to the NLGA:

One response to this theme is that it proves too much and would, if accepted, wipe out the core of the Norris-LaGuardia Act. The linchpin of AT&T's argument is that if the employer has a substantive right (here, to a judicial decision about arbitrability) then there must be a remedy by way of injunction. It would be only a small step to plug in other substantive rights . . . If AT&T's syllogism is appropriate, then courts must have authority to enforce this right by issuing injunctions. Bye, bye, Norris-LaGuardia Act, for this was the very way in which courts evaded § 20 of the Clayton Act! Yet in *Burlington Northern* the Supreme Court unanimously held that the Norris-LaGuardia Act forbids injunctive relief against a secondary boycott, despite the fact that the boycott violated the employer's substantive rights<sup>191</sup>. . . What Congress established through the Norris-LaGuardia Act is that a substantive right does not imply an injunctive remedy. Employers have to settle for damages or other forms of ex post review, even if they turn out to be less effective at vindicating the underlying right.<sup>192</sup>

Similarly, the Eleventh circuit, in evaluating whether the NLGA could

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<sup>188</sup> 317 F.3d 758 (7th Cir. 2003)

<sup>189</sup> *Id.* at 759

<sup>190</sup> *Id.* at 760-61: (opining that prohibition of injunctions in labor disputes mandated in Section 1 of the NLGA are not limited to labor activities specifically enumerated in Section 4 of the statute; rather, the section refers to "core union operations" concerning which Congress was shouting, "we really mean it.")

<sup>191</sup> One may question Judge Easterbrook on this point, but it does not impact the essence of the argument.

<sup>192</sup> *Id.* at 761



be interpreted to authorize injunctions to avoid arbitration, stated,

The limited judicial exceptions crafted in large part to effectuate Congress' strong preference for labor arbitration do not apply when a party asks for injunctive relief in order to avoid arbitration. In such a case, the Norris-LaGuardia Act applies and a district court has no jurisdiction to issue such an injunction except pursuant to a statutory exception.<sup>193</sup>

The courts have begun to place the *Boys Markets* exception in the appropriate context, in large measure because it is simply a fair reading of broader underlying NLGA policy.

There remains the question of what policy, precisely, the NLGA endorsed. A policy of "non-interference" by federal courts is certainly in evidence, as has been repeatedly emphasized. But the purpose of non-interference, as shown by the policy statement accompanying the statute,<sup>194</sup> is broader than the protection of collective bargaining, or of labor organizations per se.

Both the NLGA and the National Labor Relations Act reference the right of employees to be free from interference of engaging in concerted activity for their "mutual aid or protection."<sup>195</sup> In this context, the NLGA exceptions can be read broadly as a kind of *quid pro quo*: employees will forego their right to engage in certain concerted activity for their "mutual aid or protection" in exchange for the labor system's provision of a non-judicial dispute resolution forum for their collective bargaining agent. That serves the collective bargaining side of the statutory formula.<sup>196</sup> The diminution of a vibrant arbitration system,<sup>197</sup> however, weakens the *Boys Markets* premise.

"Mutual aid or protection" is no less a part of the formula, and is vouchsafed in the absence of statutory waivers like no-strike agreements. Admittedly, the contours of "mutual aid or protection" have never been clearly delineated. In *Eastex, Inc. v. NLRB*,<sup>198</sup> for example, a case arising under the National Labor Relations Act, the Supreme Court discussed the meaning of that statute's "mutual aid or protection" clause.

The issue in *Eastex* was whether an employer that had prevented its

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<sup>193</sup> Triangle Const. & Maintenance Corp. v. Our Virgin Islands Labor Union, 425 F.3d 938, 952 (11th Cir. 2005).

<sup>194</sup> See *supra* n.176

<sup>195</sup> See *supra* n.176, 178

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* n.88

<sup>198</sup> 437 U.S. 556 (1978).

union-represented employees from distributing a union newsletter in non-working areas of the employer's property had violated the NLRA by interfering with the statutory right for employees to engage in "other concerted activities" for the purpose of "mutual aid or protection."<sup>199</sup> The newsletter urged employees to support the union, and also discussed a proposal to incorporate a state "right-to-work" statute into the state's constitution, and a presidential veto of an increase in the federal minimum wage.<sup>200</sup> In defense of its distribution prohibition, the employer argued that the sections of the newsletter discussing the right-to-work and presidential veto issues did not fall within the purview of the "mutual aid or protection" clause.<sup>201</sup> The NLRB rejected the employer's argument and found a violation of the National Labor Relations Act, and the Fifth Circuit affirmed.<sup>202</sup>

The Supreme Court, on review, discussed various issues in finding that the leafleting was protected. One aspect of the Court's discussion considered the breadth of the NLRA's "mutual aid or protection" clause. The Court observed that Congress had deliberately placed "mutual aid or protection," along with "self-organization" and "collective bargaining," as the objectives at which the protection of employee activity was aimed, realizing "that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context."<sup>203</sup> The Court agreed, however, that, "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity . . . ," and that under the NLRA the National Labor Relations Board would have to determine the boundaries of the clause.<sup>204</sup>

If the same kind of broad reading were allowed the "mutual aid or protection" clause of the NLGA, the question arises as to whether any of the NLGA exceptions that have been discussed apply absent a viable non-judicial forum. As Richard Trumka argued, in an essay objecting to the revision of arbitration awards upon judicial review, the whole point to the *Boys Markets* exception is "to prevent . . . displacement of the arbitral

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<sup>199</sup> *Eastex, Inc. v. NLRB*, 437 U.S. at 558.

<sup>200</sup> *Id.* The union argued that the elevation of the state right to work law to state constitutional status was objectionable and urged its members to write to their legislators to oppose it. The union also criticized the President's veto of the minimum wage increase while the profits of the oil industry were increasing and argued that "as working men and women we must defeat our enemies and elect our friends." The newsletter concluded by urging its recipients to vote.

<sup>201</sup> *Id.* at 561.

<sup>202</sup> *Id.* (internal citations omitted).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 567-568.

process by self-help. Thus, the argument can be made that self-help remedies become permissible once the arbitral remedy has itself been displaced.<sup>205</sup> The self-help alluded to is the NLGA residuum, "concerted activities for the purpose of . . . other mutual aid or protection." Take away collective bargaining and mutual aid or protection springs to the fore.<sup>206</sup>

In the bankruptcy context, the *Boys Markets* exception may continue to apply, for it is clear that the automatic stay does not interfere with arbitration unless a debtor rejects the collective bargaining agreement altogether.<sup>207</sup> However, if the debtor-employer declines to arbitrate, or if the collective bargaining agreement is successfully rejected, the predicate for the *Boys Market* exception will have fallen by the wayside. In that event, the original justification for suspending Section 4 of the NLGA – the provision of a forum for a labor dispute -- evaporates. Concerted activity in response to a bankruptcy-context labor dispute would be in essence resting on its "mutual aid or protection" laurels, and it does not appear that the NLGA itself could furnish a justification for departing from the anti-injunction rule. The courts would lack defensible standards in any attempt to afford primacy to a bankruptcy injunction.

An employer's right to reject a collective bargaining agreement upon court approval raises an additional point. Some commentators in the 1980s read into this right a broad, if implicit, understanding by policymakers that bankruptcy law generally trumps labor law.<sup>208</sup> With the benefit of hindsight, two responses may now be made to this position. First, subsequent legislative developments demonstrated that Congress, at least, did not deem the matter that simple.<sup>209</sup> Second, the "generally trumps" position failed to take into account the full breadth of NLGA policies.

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<sup>205</sup> Richard L. Trumka, *Keeping Miners Out of Work: The Cost of Judicial Revision of Arbitration Awards*, 86 W. Va. L. Rev. 705, 706 (1984).

<sup>206</sup> One might object that the "mutual aid or protection" language in the NLGA is merely a policy statement and does not have the force of positive law. *See e.g.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding National Industrial Recovery Act unconstitutional because broad powers under Act insufficiently constrained by mere policy statement and introduction to statute). The same, however, is true of "collective bargaining." That both were enacted into positive law three years later in the NLRA takes both policies beyond the realm of the merely prefatory.

<sup>207</sup> *In re Ionosphere Clubs*, 922 F.2d 984, 992 (2d Cir. 1990).

<sup>208</sup> *See* Haggard, *Apparent Conflict*, at 725 (" . . . a broad reading of *Bildisco* suggests that that the Norris-LaGuardia Act should now yield to the bankruptcy code"); *see also* Poe, *Bankruptcy Court's Dilemma*, at 334 (arguing that courts considering contract rejection issue have concluded that the "Bankruptcy Act's provisions were intended to prevail")

<sup>209</sup> The right is now codified in 11 U.S.C. §1113. For a brief explanation of how that provision overruled the Supreme Court's opinion in the *Bildisco* case *see infra* at n.248. A detailed exposition of the case is not required here.

One court touched upon the second point in passing. In a 1970s case pre-dating the lead-up to the new contract rejection legislation, the Second Circuit, in *Shopmen's Local Union No. 455 v. Kevin Steel Products*,<sup>210</sup> analogized a debtor-in-possession to a successor employer. This analogy provides a useful basis for distinction between the NLGA's mutual aid or protection and collective bargaining policies.<sup>211</sup> Under Supreme Court precedent, when a "successor" employer acquires a formerly unionized "predecessor" employer, the successor may or may not have an obligation to recognize the union,<sup>212</sup> but will not have an obligation to honor a preexisting collective bargaining agreement.<sup>213</sup> Nevertheless, whether the successor employer recognizes the union or does not, whether it honors the preexisting collective bargaining agreement or does not, its employees in either event retain their rights under the NLRA to engage in concerted activities for mutual aid or protection. Those rights remain irrespective of the status of the union's collective bargaining rights.

Similarly, the fact that a collective bargaining agreement may be lawfully rejected speaks solely to the collective bargaining/arbitration side of NLGA policy. Any post-bankruptcy dispute having a connection to employment will continue to fall within the NLGA's broad definition of labor dispute. The same result would have obtained even if a union previously had never achieved a collective bargaining agreement with a bankrupt employer.

#### B. First Amendment Considerations

Circuit courts considering peaceful picketing and leafleting in bankruptcy cases have not typically addressed the extent to which a construction of the Code allowing extirpation of that conduct would implicate the First Amendment. This is understandable because they have been able, and would prefer, to rest their opinions on narrower statutory grounds, but the issue has a place in a broader policy discussion.

A stay operating to forbid expressive activity on the theory that it is an "act to obtain the property of" a debtor's estate, or that it is an "act to collect . . . a claim . . . that arose before the commencement of the case"<sup>214</sup> appears

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<sup>210</sup> 519 F.2d 698, 704 (2d. Cir.1975).

<sup>211</sup> The court was making the point that if a troubled debtor-in-possession was compelled to honor a burdensome collective bargaining agreement it would be in a better position than a financially healthy acquirer.

<sup>212</sup> *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272, 279 (1972) (holding that successor employer generally required to recognize predecessor employer's union if the collective bargaining unit in question continues to be appropriate).

<sup>213</sup> *Id.* at 285-90.

<sup>214</sup> *See supra* n.124.

to present a facial First Amendment problem. "There is no doubt that as a general matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment."<sup>215</sup> A presumption that protest amounts to acts proscribed by an automatic stay would remove all pretense of a carefully tailored time, place and manner restriction.<sup>216</sup>

"Pure" protest presents the most objectionable case. During a post-petition labor dispute, a union may simply want to publically express its opinion that the bankrupt debtor is a "rat."<sup>217</sup> A union may wish to protest a debtor's alleged refusal to participate in a negotiation process, as opposed to protest of the debtor's refusal to agree to any particular bargaining term. A union may wish to protest the discharge of an employee whom it alleges was fired for unlawful reasons.<sup>218</sup> These suppositions vastly understate the great variety of situations in which unions might carry out strikes, picketing

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<sup>215</sup> U.S. v. Grace, 461 U.S. 171, 176-77 (1983). The question of the conduct element of picketing is difficult. The judiciary has believed for some time that "[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated," Teamsters Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942), and that patrolling is, accordingly, subject to regulation. For ease of exposition, therefore, it will be assumed that the picketing in question is not being conducted by large masses of employees, is peaceful, and does not independently violate the law.

<sup>216</sup> See e.g. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983). It cannot be known in advance whether speech would be suppressed in a forum in which time, place and manner restrictions would be relevant. See Greer v. Spock, 424 U.S. 828 (1976) (holding that no First Amendment right to expression on military base exists). That, of course, is the point.

<sup>217</sup> This discussion further assumes that all of the labor activity in question is "primary." Primary labor activity usually consists of strikes, picketing or leafleting "of an employer against whom the employees have a grievance." See Jerome R. Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 Yale L. J. 341, 343 (1938). Secondary boycotts would be independently subject to injunction under the National Labor Relations Act. 29 U.S.C. 160(l). As the discussion in *Burlington Northern* demonstrated, however, secondary picketing is, with limited exceptions, not unlawful, or subject to injunction, under the Railway Labor Act.

<sup>218</sup> Professor Haggard has noted that a union's efforts to compel an employer to agree to collective bargaining was once found by the Supreme Court to fall within the Hobbs Act's prohibition on "the obtaining of property from another" by the use of force. Haggard, *Apparent Conflict*, 708, n.29, citing U.S. v. Green, 350 U.S. 415, 420 (1956) (holding that although the Hobbs Act -- an anti-extortion statute -- by its terms was not meant to affect existing labor law, no labor statute protected unions or their officials in attempts to get personal property through threats of force or violence compel employers to agree to collective bargaining and other terms and other wage demands). The NLGA does not, of course, protect violent conduct. 29 U.S.C. §104(i). Unlawful, violent union compulsion being defined as an attempt to "obtain property" in an anti-extortion context, says little about how peaceful labor activity can be defined in the same way. They are not parallel cases.

or leafleting that are not reasonably interpretable as acts to obtain property or as the assertion of pre-petition claims. Only one circuit court appears to have considered these difficulties, and no circuit courts appear to have considered the issue of the automatic stay's suppression of speech in a labor context.

In *Turner Advertising Co. v. National Service Corp.*,<sup>219</sup> a bankruptcy court issued an injunction to prevent creditor Turner from superimposing on billboards throughout the Atlanta metropolitan area, which it had prepared for bankrupt debtor National Service,<sup>220</sup> "a message that the company was in bankruptcy and may not be able pay its bills."<sup>221</sup> National Service obtained an injunction from the bankruptcy court to stop the display of the message. That court ordered, "TAC cannot publish any information about NSC which publication amounts to no more than an attempt to harass and intimidate the debtor . . . TAC is enjoined from publishing any information about NSC which constitutes a violation of the automatic stay of section 362."<sup>222</sup> Turner appealed to the district court, which affirmed the bankruptcy court order on the theory that Turner's message was misleading commercial speech.<sup>223</sup> Alternatively, the district court held that the bankruptcy court was authorized to issue an injunction even assuming Turner's communication was pure speech.<sup>224</sup>

The Fifth Circuit Court of Appeals reversed.<sup>225</sup> The court first determined that Turner's threatened message was not commercial speech because it was neither a solicitation for a sale or purchase nor a mere advertisement.<sup>226</sup> Determining that Turner's intended communication was "pure speech," the court concluded that the bankruptcy court's injunction

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<sup>219</sup> 742 F.2d 859 (5th Cir. 1984)

<sup>220</sup> National Service was a Sears franchisee, and the billboards had originally depicted "Sears Authorized Plumbers;" Sears litigated the matter aggressively. *Id.* at 861-62.

<sup>221</sup> *Id.* at 860

<sup>222</sup> *Id.* at 861. National Service originally obtained an *ex parte* order:

[R]estraining TAC from taking any action or doing anything designed to or having the effect of collecting, assessing or recovering on any claim arising before [the filing of the bankruptcy petition . . . [and] . . . enjoin[ing] TAC from publicly stating that NSC was a debtor in a Chapter 11 case or from conveying any message, directly or indirectly, which would adversely affect the business done by Sears or NSC in any area in which either or both were engaged in business.

*Turner Advertising Co. v. National Service Corp.* at 861.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 862

<sup>226</sup> *Id.*

was an impermissible prior restraint on first amendment expression.<sup>227</sup> In support of its conclusion the court stated:

A review of the bankruptcy and district courts' decisions demonstrates that the content of TAC's message was restrained and prohibited. The blanket provisions of the bankruptcy judge's order prohibited TAC from disseminating its message simply because the message was thought to be threatening to NSC. The mere fact that NSC would be damaged by TAC's dissemination of the message, however, does not warrant a prior restraint.<sup>228</sup>

It might of course be argued -- and at least one commentator has made the argument<sup>229</sup> -- that Turner's actual objective was to compel National Service to pay the overdue bill that was at issue, not to engage in protected speech. The point, however, is that in the bankruptcy context an automatic stay attaches immediately. When, as in Turner's case, a sweeping, *ex parte*, preliminary injunction follows the stay, the purpose and content of Turner's communication was suppressed *ab initio*. Whatever a prior restraint may be,<sup>230</sup> the Fifth Circuit was not prepared to uphold an injunction premised on speculative harm that was probably *damnum absque injuria*.<sup>231</sup>

Justice Scalia made the same point respecting prior restraints forcefully and eloquently:

The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough *even when they are based on a completed or impending violation of law* . . . The temptation in cases involving issues of social controversy--precisely the cases

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<sup>227</sup> *Turner Advertising Co. v. National Service Corp.* at 862. The court repeated the familiar rule that "[w]hen the content of pure speech is restrained and prohibited, the restraint bears a heavy presumption against its validity and mandates the closest scrutiny." *Id.* (internal citations omitted).

<sup>228</sup> *Id.* citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>229</sup> Douglas E. Deutsch, *Ensuring Proper Bankruptcy Solicitation: Evaluating Bankruptcy Law, the First Amendment, the Code of Ethics, and Securities Law in Bankruptcy Solicitation Cases*, 11 Am. Bankr. Inst. L. Rev. 213, 237 (2003).

<sup>230</sup> See John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L. J. 409, 420 (1983) (stating that prior use doctrine is a "formulation whose current contribution to the interpretation of the First Amendment is chiefly confusion").

<sup>231</sup> *Damnum absque injuria*: "Loss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." BLACKS LAW DICTIONARY (8th ed. 2004).

where the First Amendment's protections are most needed-- will always be for judges to discern a "policy" against whatever-speech-looks-bad-at-the-moment.<sup>232</sup>

In the labor context, the Supreme Court has been careful to interpret labor statutes restricting peaceful labor conduct with an expressive component in a manner that avoids First Amendment issues.<sup>233</sup> Bankruptcy courts would be well served to exercise particular caution whenever it is alleged that peaceful picketing closely resembling "pure" protest is violates the automatic stay.<sup>234</sup>

### C. Damnum Absque Injuria

Under the surface of the cases assessing the interplay between the automatic stay provision of the Code and the anti-injunctive mandate of the NLGA percolates the question of whether a labor dispute's potential for inflicting economic injury to a bankrupt entity attempting reorganization is *damnum absque injuria* -- an injury for which the law affords no remedy.<sup>235</sup> Despite the seeming harshness of this position, it is perfectly consistent with longstanding law, following the ancient maxim that the destruction of business occasioned by lawful strikes is *damnum absque injuria*.<sup>236</sup> Oliver

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<sup>232</sup> *Lawson v. Murray*, 515 U.S. 1110, 1114 (1995) (emphasis supplied)

<sup>233</sup> In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades*, 485 U.S. 568 (1988), the Supreme Court interpreted Section 8(b)(4) of the National Labor Relations Act, proscribing secondary labor pressure directed against neutral employers, as allowing peaceful, but arguably secondary, leafleting. The opinion was contrary to the National Labor Relation Board's reading of the statute. The Court, however, utilized the rule of statutory construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [it] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 575 citing *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). Concluding that the suppression of peaceful leafleting would unnecessarily raise serious constitutional problems, the Court chose an alternative construction avoiding First Amendment difficulties. *Id.* at 578.

<sup>234</sup> One method to accomplish this objective would be to require the debtor, in circumstances involving peaceful picketing or leafleting, to show cause why the court should not summarily reject the allegation.

<sup>235</sup> See *supra* n.231

<sup>236</sup> *Commonwealth v. Hunt*, 45 Mass. 111, 134 (1842) (declaring that "Journeyman Bootmaker Society" was not chargeable with conspiracy, because it engaged in no underlying unlawful acts, even assuming that the intent of the society was to "impoverish" master and journeyman bootmakers, and a master cordwainer); *Picket v. Walsh*, 192 Mass. 572, 584-85 (1906) (holding that the destruction of business by labor unions' right of competition lawful provided strike is lawful)



Wendell Holmes reflected upon the argument long ago.<sup>237</sup> Holmes thought that society was a net beneficiary of the struggle between labor and capital,<sup>238</sup> and that if labor acted in its legitimate self-interest,<sup>239</sup> without an unlawful object,<sup>240</sup> it should be allowed to "combine," even if the effect of the combination was to inflict injury on its "antagonist."<sup>241</sup>

Both the *Crowe* and *Bohack* decisions addressed this question in the bankruptcy context as an afterthought. In *Crowe*, the court, recognizing the potential harshness on the employer-debtor of its refusal to enjoin the union's picketing, stated:

We recognize that this legal result casts upon *Crowe* inequities . . . But *Crowe* has no control over many economic forces [that] affect the outcome of its reorganization. Moreover, the strike is a legitimate weapon, designed to strip the employer of economic control. The labor laws recognize that a strike may drive an employer out of business.<sup>242</sup>

The court in *Bohack* expressed a similar view:

The argument is made that to allow picketing in the case of this financially troubled debtor is to put it out of business. That is, unfortunately, sometimes the sad outcome when a union and an employer cannot come to terms. But the policy of our labor laws is simply to provide rules for the handling of labor disputes, not to prohibit the use of economic power in the resolution of such disputes. By filing under Chapter XI an employer does not become clothed in immunity from union action.<sup>243</sup>

One bankruptcy court responded in the following manner to a union's assertion that it would strike in response to the court's allowance of the rejection of the union's collective bargaining agreement with an employer:

The [union] has stated that it will strike if the Debtors are allowed to reject their collective bargaining agreements, and

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<sup>237</sup> *Vegelahn v. Guntner*, 167 Mass. 92 (1896) (Holmes, J., dissenting).

<sup>238</sup> *Id.* at 108

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 107

<sup>241</sup> *Id.* at 109

<sup>242</sup> *Crowe & Associates*, 713 F.2d at 216.

<sup>243</sup> *Teamsters 807 v. Bohack*, 541 F.2d at 318.

force the union to accept the terms its members previously rejected. A strike is an inherent risk in every [contract rejection action], and in the end, it makes little difference if the Debtors are forced out of business because of a union strike or the continuing obligation to pay union benefits to avoid one. The unions may have the legal right to strike, but that does not mean that they must exercise that right. The union's right to strike carries with it the burden of holding the fate of the rank and file in its hands. Little purpose would be served by a strike if a strike results in the termination of operations and the loss of jobs by the strikers.<sup>244</sup>

That view reflects closely the traditional labor law, "mutually assured destruction" position in these matters,<sup>245</sup> which in turn reflects a societal cost-benefit assessment that has not been repudiated in seven decades. As Holmes also said, however, "[p]ropositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof."<sup>246</sup> One fundamental policy of bankruptcy reorganization is to capture the "going-concern value of a business."<sup>247</sup> This policy is at odds with any competing policy even marginally less protective of reorganization or permissive respecting liquidation.<sup>248</sup>

The tension here cannot be denied. As Professor Warren has explained, however, bankruptcy policy is made up of competing interests in a way that is not always efficient or necessarily protective of the broader public interest:

The rationale for protecting parties without formal legal rights may simply be political in nature; such protection encompasses a wider range of voters than the particular creditors who would profit from the immediate enforcement of their rights. Moreover, some of the parties without formal

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<sup>244</sup> In re Horsehead Industries, 300 B.R. 537, 587 (Bankr.S.D.N.Y.2003)

<sup>245</sup> For a persuasive argument along these lines see Craver, *Impact of Financial Crises* at 507.

<sup>246</sup> *Vegelahn v. Guntner*, 167 Mass. at 106

<sup>247</sup> Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 Mich. L. Rev. 336, 350 (1993) [hereinafter *Imperfect World*]

<sup>248</sup> See *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 524-25 (1984) (rejecting standard that debtor in possession should not be permitted to reject the collective-bargaining agreement unless it can demonstrate that its reorganization will fail unless rejection is permitted in favor of much less strict standard). Congress subsequently overruled *Bildisco and Bildisco* in several respects, including by establishing that the collective bargaining agreement may not be rejected unless the equities clearly favor it.

legal rights have well-organized political clout. The presence of a few clear giveaways to successful lobbying groups makes it clear that the Bankruptcy Code is no more immune to political influence than any other legislation Congress passes. On the other hand, many of the beneficiaries of the indirect protection for parties without legal rights are, at best, only loosely organized groups that have shown little interest in the bankruptcy laws.<sup>249</sup>

To imagine, therefore, that any conflict between the NLGA and the Code would represent a contest between clearly defined, inherently antagonistic policies is illusory. If unions are rent seekers in reorganization dramas, then they are exerting pressure outside of the formal bankruptcy process, competing with learned hands that have exacted more sophisticated rents within the labyrinth of the formal process.<sup>250</sup> Indeed, it is precisely in light of the shifting, intangible, contours of bankruptcy policy that Professor Warren cautions bankruptcy judges to confine their decisions to the Code itself:

This observation leads to a question of application. Should a judge base a decision specifically on the interests of these parties without formal legal rights? Some judges believe they can discern and protect the public interest. I would argue that

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<sup>249</sup> Warren, *Imperfect World* at 356

<sup>250</sup> Recent events have vividly underscored these policy inconsistencies. In a Railway Labor Act case decided by the Second Circuit, *In re Northwest Airlines Corp.*, 483 F.3d 160 (2nd. Cir. 2007), judge John M. Walker, Jr., a first cousin of former president George W. Bush, upheld an injunction forbidding a union from engaging in work stoppages in protest of stalled negotiations during bankruptcy proceedings. Judge Walker opined that the union had "not sought to persuade its members of the need to 'face up to economic reality,'" and had "fail[ed] to take account, as it must, of the duty Northwest 'owes the public[.]'" *Id.* at 176. Implicit in this statement, of course, is the notion that the rights of labor have little to do with the "public interest." See generally Seltzer & Ciantra, *Government by Injunction*.

Meanwhile, another first cousin of former President George W. Bush, ex-Lehman executive George W. Walker, felt it necessary to apologize to other Lehman officials when a fellow Lehman executive had the temerity to suggest that executive bonuses be foregone in light of the impending Lehman bankruptcy. See Statement of Chairman Henry Waxman, House of Representatives Committee on Oversight and Government Reform, *The Causes and Effects of the Lehman Brothers Bankruptcy*, October 6, 2008, p. 55, lines 1139-1150 available at <http://oversight.house.gov/documents/20081010150253.pdf>. (last visited July 22, 2009).

they should not go beyond the statutory mandate to permit a reorganization effort bounded by enumerated legal constraints. To enlarge those rights beyond the estate's opportunity to reorganize risks upsetting the balance of interests established by the legislature.<sup>251</sup>

This point returns the discussion to the NLGA's starting premise: legislatures should make labor policy, not judges purporting to implement the law of dissimilar legal regimes. It is doubtful that the architects of the NLGA would have thought it particularly likely that bankruptcy judges interpreting the Code would be able to keep their underlying views of a labor dispute separated from their ultimate substantive decision.

### CONCLUSION

It is disingenuous to attempt to evade the intent of the framers of the NLGA. A famous late judge of the federal Northern District of Ohio, Don John Young, Jr., probably expressed the mood of the enacting Congress as well as any commentator could:

In spite of the many years that the Norris-LaGuardia Act has been on the books - in which the Congress declared very forcibly by enactment of that legislation that they expected the era of robber-barons to come to an end; that was a time when the courts were mere minions of wealth and power to keep the people of the country under subjection - in spite of that, wealth and power doesn't give up so easily. It still wants to go on running things the way they were in the Good Old Days when it was in the saddle. But I think we have to do what Congress says we should do and that Congress wanted labor matters to be resolved in other tribunals than the courts, and therefore unless there can be a very strong showing that this court has jurisdiction and that there are reasons why it should exercise the extraordinary power of injunction that the court should bow to the will of Congress and not exercise those powers which the Congress indicated that it should not.<sup>252</sup>

Ideology aside, federal courts are simply not authorized to issue

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<sup>251</sup> Id. at n.47

<sup>252</sup> *Chesapeake & Ohio Railway Co. v. International Longshoremen's Association*, No. C 79-292, 1979 WL 2000 at \*1 (N. D. Ohio May 23, 1979).

injunctions in labor disputes in other than the very narrow exceptions discussed in this article. Bankruptcy injunctions certainly do not explicitly fall within those exceptions. The policy reasons for not interpreting the Code as implicitly carving out bankruptcy exceptions are substantial. Courts continue to recognize the passionate view of the 72nd Congress, and implicitly of the generation of which it was a part -- echoing across decades -- that federal courts should not be permitted to issue injunctions that have the effect of extinguishing labor disputes in their early stages. A reversal of course respecting this deeply held view of the need for social catharsis would be dramatic, and should be effectuated, if it is to be, by the representatives of the people. The firewall should be respected.