The Circle of Boys Market: A Comment on Judicial Inventiveness

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The author reexamines the Supreme Court's 1970 Boys Market opinion which empowered federal courts to enjoin strikes in breach of collective bargaining agreements. The author argues that Boys Market, while ostensibly grounded on neutral concerns for the integrity of state court jurisdiction and authority, in fact was based primarily on the Court's value choice that there is no effective substitute for an immediate halt to a strike. The author concludes that the Court's position is not supported by legislative history and, indeed, conflicts with limits placed by Congress on federal judicial policymaking in the area of labor injunctions.

This comment focuses on the continued unwillingness of courts to restrain from judicial policymaking in the area of labor injunctions, even in the face of a legislative enactment expressly designed to fetter such judicial inventiveness. Historically the strike injunction has been perhaps the most emotive act of state intervention into labor conflicts. The judicial response in contemporary labor law, as under the common law, often conceals valuation behind certain seemingly value-neutral notions such as state-federal relations. Concern about the integrity of state court jurisdiction was said to be the motivating force behind permitting injunctions for breaches of collective agreements. But obfuscation often returns to haunt the Court, and such a possibility is the theme presented here.

In 1970 the Supreme Court held that federal courts could enjoin strikes in breach of contract despite the Norris-LaGuardia Act's ban on federal court injunctions in labor disputes. The Boys Markets, Inc. v. Retail Clerks Union, Local 7701 decision required the overruling of

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Sinclair Refining Co. v. Atkinson, decided only eight years earlier. Boys Markets was overwhelmingly supported by academic writing for a variety of reasons. Many scholars agreed with the Court that the concerns which motivated the Norris-LaGuardia Act were no longer present since courts were no longer anti-union and unions were now strong and established. Moreover, standards now existed to protect against judicial abuses because the cases would involve breaches of written agreements. Most importantly, perhaps, it was believed that injunctions against strikes which violated no-strike promises were necessary for the integrity of the arbitration process, which had received substantial judicial attention and support.

The heart of the Boys Markets decision, however, seems to be a concern for state authority which, due to the Supreme Court's own rulings, had been effectively eliminated. When employers brought injunction actions against unions in state courts, based on the breach of an express or a judicially created no-strike promise, unions would often remove the dispute to federal court under federal question removal jurisdiction. The removal was perfectly proper since the substantive law of collective agreements is "federal law, which the courts must fashion from the policy of our national labor laws."

Decisions of the Supreme Court prior to Boys Markets had left two important questions open. The first question was whether state courts could enjoin strikes in breach of contract. Although the Norris-LaGuardia Act barred federal courts from enjoining strikes, even those in breach of an agreement, the Act expressly applied only to the federal courts. If state courts could enjoin, however, a strange situation would exist. State courts, required to apply federal substantive law because of a desire for uniformity, could nevertheless enjoin strikes where federal courts could not. This question would remain academic if unions could routinely remove to federal court, at least in those cases in which an injunction was not in the union's interest. But this led to the second question: whether federal courts, after removal, were "required to dissolve any injunctive relief previously granted by the state courts." If federal courts could not quash state injunctions, then removal would not serve as a remedial strategy for unions. This result would both maintain state power, by allowing state courts to grant an important remedy barred from the arsenal of federal courts, while it would simul-

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7. Boys Market, 398 U.S. at 244.
taneously make states the primary, employer-preferred forum for these actions. If, on the other hand, federal courts were required to quash, then the right of state courts to enjoin strikes would not be a significant question.8 In the late 1960s, there seemed to be a general consensus that, after removal, a federal court was required to dissolve a previously-granted state court injunction.9

The Boys Markets majority relied on this situation to reconsider and then overturn Sinclair. Prior cases, Justice Brennan said, “produced an anomalous situation,”10 to “oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation” was “wholly inconsistent” with prior decisions which had held that “§ 301(a) was to supplement, and not to encroach upon, the pre-existing jurisdiction of the state courts.”11 Thus, even though breach of contract cases could begin in state court, the fact that federal courts could not grant such injunctions and would actually quash any previously granted state court injunction encouraged employers to bring injunctive actions in state court and motivated unions to seek removal to federal courts.

It was not completely accurate for the Court to complain that section 301, “the very provision that Congress clearly intended to provide additional remedies for breach of collective-bargaining agreements,”12 had been unaccountably employed to displace previously existing state remedies. State jurisdiction still existed, but it is, of course, always subject to the appropriate use of the removal power. Indeed, after Boys Markets unions can still remove to federal court, although removal no longer serves the purpose of total avoidance of an injunction.13

8. I recognize that the state court injunction would be enforceable until the federal court acted. See Lowden and Flaherty, Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of Buffalo Forge, 45 GEO. WASH. L. REV. 633, 666 (1977). The Supreme Court held in 1974 that a state temporary restraining order remains in effect after removal but no longer than it would have remained in effect under the state's own law. Granny Goose Foods, Inc. v. Teamsters Local 70, 415 U.S. 423, 440 (1974). Moreover, Federal Rule of Civil Procedure 65(b) sets a maximum life on such injunctions. This maximum term, measured from the date of removal, limits the injunction's life to 10 days although this period can be extended to 20 days for good cause shown. If courts grant such an extension and are free to respect (or powerless to alter) the 10 day period, then the state court's order may indeed be effective to determine the dispute. 415 U.S. at 440.


10. Boys Markets, 398 U.S. at 244.


Moreover, despite the Court's professed concern for state court authority (for it is really not state jurisdiction that is involved), the problem stems not from unions which tactically employed the removal statute but from the Court's own decision in Lincoln Mills which preempted state substantive law (but not state jurisdiction). The Court in Lincoln Mills upheld the constitutionality of section 301 by finding that the Act created a body of yet undetermined law which federal courts would apply in breach of contract actions. This law, which must be deemed a federal "common law," would be exclusively federal and conflicting state law would be preempted. State law, the Court noted, "will not be an independent source of private rights." Since removal exists in section 301 cases before and after Boys Markets, the technical scope of state jurisdiction remains unchanged by that decision. What is altered, and it is certainly of critical importance, is that unions have much less incentive to seek removal of state injunction proceedings since federal courts may now also enjoin strikes. The battle, nevertheless, is less about state power than the availability of injunctions. Far from involving an abstract dispute over federal-state relations and the scope of state court judicial power, the central problem posed by Boys Markets is whether, as a matter of public policy and statutory interpretation, labor injunctions ought to be more freely available. It is simply disingenuous for the Court to mourn the loss of state authority because of the removal statute.

Ironically, although state legislatures were presumably free to enact statutes enforcing collective agreements prior to section 301, few did. Thus, it can be argued that state courts received an authority from section 301 not provided by state legislatures. Thus, the effect of section 301 was to foist upon some states, at least, an authority that may

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There seems to be no published empirical data revealing whether unions removed for other reasons. Moreover, we do not seem to know whether the incidence of removal slackened after Boys Markets. Many union attorneys believe that federal judges are often more hospitable to unions than are state judges or at least that federal judges are more hospitable to the policies of the NLRA.


15. Prior to the passage of § 301, the status of unions as unincorporated associations created problems for litigants. This problem affected not the suability of unions but the accessibility of union assets. H.R. MINORITY REP. NO. 245, 80th Cong., 1st Sess. 108 (1947); see also S. MINORITY REP. NO. 105, Pt. 2, 80th Cong., 1st Sess. 14-15 (1947). The minority reports attempt to counter the allegations of the majority that the "laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union." S. REP. NO. 105, 80th Cong., 1st Sess. 15 (1947). These contentions suggest that the desire to make agreements "enforceable", even no-strike promises, was primarily concerned with damages, not injunctions. Interestingly, there is little if any comment about the ancient common law doctrine that promises to arbitrate cannot be enforced.
not have been desired and that had not been provided by the state legislature.

The legislative history of section 301 is singularly unhelpful in answering critical questions although some assistance is provided. As the Supreme Court noted accurately in *Lincoln Mills*, a primary and often expressed concern of Congress was that "unions as well as employees [sic] should be bound to collective bargaining contracts."\(^{16}\) There clearly was a concern with no-strike promises and their enforcement. After all, what sections of a collective bargaining agreement are unions likely to violate? Indeed, although the discussion is noticeably vague, the emphasis is probably far more directed to strikes which breach agreements than to refusals to arbitrate. Both the Senate and the House bills contain provisions which would have made the failure to abide by an agreement to arbitrate an unfair labor practice.\(^{17}\) This feature was dropped by the conference committee because, the report stated, "Once parties have made a collective bargaining contract the enforcement of this contract should be left to the usual processes of the law and not to the National Labor Relations Board."\(^{18}\)

Legislative concern over the enforcement of no-strike promises is clearly expressed:

If Unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.\(^{19}\)

Such explicit references to the no-strike promise, as well as continual references that collective bargaining agreements should be made

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18. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947). The phrase, "usual processes of law," is sometimes meant to show congressional support for the use of injunctions, at least by states, but the context makes it much less clear. The Conference committee seems merely to be referring to the choice of judicial over administrative enforcement.
“equally binding and enforceable on both parties,” demonstrate the desire to use the federal courts to enforce no-strike promises.

The Supreme Court acknowledged this congressional concern, and stated in a famous phrase that “plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike.” There was no evidence presented that such a trade had actually been made, and the Court seems to have something in mind other than the explicit bargaining of the parties. The functional purpose of this phrase, I would suggest, is as follows: having already explained that Congress wanted no-strike promises enforced, the Court then equated the arbitration clause with the no-strike clause (assuming that a trade had been made) in order to arrive at its ultimate conclusion in *Lincoln Mills* that courts may enjoin the refusal to arbitrate. It is only later that the *quid pro quo* language takes on a substantive meaning of its own.

None of this, however, clearly resolves the question at issue. It is true that Congressperson Hartley, a sponsor of the bill in the House, was asked by Congressperson Barden about the scope of the Act. He stated his understanding, with which Hartley heartily agreed, that the Act contemplates “not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances,” giving as an example an action for declaratory judgment. There is no suggestion here, of course, that the Act modifies the Norris-LaGuardia Act. Indeed, the rejection of the House bill which would have made the Norris-LaGuardia Act inapplicable to section 301, as well as the explicit modifications of section 6 of the Norris-LaGuardia Act in section 301(e), would seem to go in exactly the opposite direction.

Most of the references to the breaches of no-strike promises and to the vagaries of state relief are consistent with the argument that the primary focus was on *damage* actions. The majority reports in both houses, for instance, stress that in some states union treasuries could not be easily reached in breach of contract or other types of actions. The problem of damages is also stressed in the House minority report, which states:

Unions have never been exempt from suits because they are labor unions. It has only been difficult to reach union assets because unions are unincorporated associations. And even here, these difficulties have been removed in the great majority of States. Actually, there are only

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20. *Id.* at 15.
22. 93 CONG. REC. 3,656-57 (1947).
23. The House report states that its bill made “the Norris-LaGuardia Act inapplicable in suits and proceedings involving violations of contracts. H.R. REP. No. 245, supra note 17, at 46. This provision simply was not accepted by the Conference committee.
13 States where union funds cannot be easily reached under laws in effect permitting satisfaction of judgments from the central funds of the union.\textsuperscript{24}

The subsequent Senate report also notes:
The laws of many states make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union.\textsuperscript{25}

The Senate report also emphasizes that “only the assets of the union can be attached to satisfy a money judgment against it; the property of the individual members of the organization would not be subject to any liability under such a judgment.”\textsuperscript{26}

The Senate report has one explicit reference to the Norris-LaGuardia Act: it notes that the Act had insulated labor unions from injunctions in cases of strikes and breach of contract.\textsuperscript{27} Certainly Congress was also aware that some activity was made non-enjoinable by “little” Norris-LaGuardia Acts in some states. The report goes on to note that no federal law existed which gave an employer any right of action for breach of contract. This is one of the few references to injunctions, but there is \textit{no} positive statement that the Norris-LaGuardia Act will be abandoned in breach of contract actions. For example, immediately following the quotation above is another reference to damages: “Even where unions are suable, the union funds may not be reached for payment of damages and any judgments or decrees rendered against the association as an entity may be unenforceable.”\textsuperscript{28} After a description of the various types and extent of financial liability of unincorporated associations in a variety of states, the Senate report concludes that “[i]t is apparent that until all jurisdictions, and particular the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements.”\textsuperscript{29}

The Conference report notes that section 302(e) of the House bill made the Norris-LaGuardia Act inapplicable in actions involving violations of agreements between employers and labor organizations. The Conference bill, however, includes “only part” of this provision. This

\textsuperscript{24} H.R. MINORITY REP., \textit{supra} note 15, at 108. The Senate minority also tried to overcome what it considered to be the false impression of the majority that it is difficult to sue unions in state courts. S. MINORITY REP. NO. 105, Pt. 2, \textit{ supra} note 15, at 14-15.

\textsuperscript{25} S. MINORITY REP. NO. 105, Pt. 2, \textit{ supra} note 15, at 15.

\textsuperscript{26} \textit{Id}. at 16.

\textsuperscript{27} \textit{Id}. at 17.

\textsuperscript{28} \textit{Id}.

\textsuperscript{29} \textit{Id}.
refers to section 6 of the Norris-LaGuardia Act, which provided a restrictive definition of a union's responsibility under agency principles. This provision in the Norris-LaGuardia Act [section 6] was made inapplicable under the House Bill [but] Section 301(e) of the conference agreement provides that for the purposes of Section 301 in determining whether any person is acting as an agent of another so as to make such other person responsible for his actions, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. 30

To all except a lawyer or judge, perhaps, the Conference report clearly indicates that the passage of section 301 only modified section 6 of the Norris-LaGuardia Act, dealing with the scope of union responsibility, and did not make the anti-injunction provisions of the Norris-LaGuardia Act inapplicable to section 301 actions.

Thus, the overruling of Sinclair had to be based on policy considerations despite legislative history. The locus of concern, as noted, was said to be the loss of state authority caused by removal and Norris-LaGuardia. The serious “problem” perceived by the Court in Boys Market existed only if: (1) state courts, unlike federal courts, could enjoin strikes; and if, (2) federal courts, after removal, must quash any state order. The Court simply assumed a positive answer to the first and ignored the second. The argument for state power to enjoin was not necessarily compelling. The Court’s analysis, however, was based on the premise that state courts indeed possessed the power to enjoin. It is clear that state courts did assume the power to enjoin strikes prior to Boys Market. In McCarroll v. Los Angeles County District Council of Carpenters, 31 for instance, Justice Traynor of the California Supreme Court perceptively foresaw the problem five years before the Court faced Sinclair v. Atkinson. Even prior to decisions such as Charles Box v. Dowd and Lucas Flour, Traynor decided (and accurately predicted) that state courts have concurrent rights to enforce the federal rights granted by section 301. He also predicted that state courts would be required to apply federal law because otherwise the “scope of a litigant’s rights will depend on the accident of the forum in which the action is brought.” 32 Of course, the choice of forum is not always accidental, especially if courts can give different remedies.

Traynor also believed, predicting the outcome of Atkinson v. Sinclair, that federal courts could not enjoin strikes in breach of a no-strike clause. 33 Yet, despite his concern for the “accidental” nature of a par-

32. Id. at 60, 315 P.2d at 330.
33. Id.
pecific forum, he held that state courts were not burdened by the Norris-LaGuardia Act. The basis for this conclusion, as in other similar state court decisions, is a mixture of formal reasoning, *ipse dixit* and issue begging. First, Traynor stated that it was not clear that Congress could "*compel* a state court to withhold a remedy that could be available if the action arose under a contract law of the state."

The breach of contract action before the California state court, however, arose technically under a federal statute, and that is why removal was always a possibility. Indeed, section 301 was passed because of a perception that effective enforcement of collective agreements in state courts appeared problematic. The "litigant's rights" are federal, and whatever remedial rights may previously have existed under state law must now be viewed in the totally different situation created by the *Lincoln Mills* decision.

Second, Traynor correctly noted that the Norris-LaGuardia Act was explicitly designed to be a limitation on federal, not state, equitable power. The issue, however, was whether Norris-LaGuardia was now subsumed under the new federal common law of section 301. After all, the Court in *Lincoln Mills* conceded that neither legislative history nor section 301 details the federal law of collective agreements. That law, in the words of Justice Douglas, is to be fashioned "from the policy of our national labor laws." The Court mentioned the NLRA as a possible, although unlikely, source of some answers and said that other "problems will lie at the penumbra of express statutory mandates." The Court did not mention any federal statute other than the NLRA, yet it did go on to hold that the Norris-LaGuardia Act did not bar an injunction to enforce a party's promise to arbitrate. Thus, it is hardly irrational to consider Norris-LaGuardia as part of the "penumbra of express statutory mandates." There seems to be no other relevant federal statute, and case law since *Lincoln Mills* has not unearthed any others.

Traynor's response was that there was no policy embedded in section 301 which required state courts to withhold the injunctive remedy. This leads to Traynor's strongest argument:

The principal purpose of section 301 was to facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and thereby to remedy the one-sided character of existing labor legislation . . . . We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had

34. *Id.* at 61, 315 P.2d at 331.
36. *Id.* at 457.
37. *McCarroll*, 49 Cal. 2d at 63, 315 P.2d at 332.
been available, and leave the employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301.38

Employers would indeed be worse off in some sense if section 301 meant injunctions were no longer available in state courts. But the Act also gave employers an action in federal court where none had previously existed, and Congress had stressed the procedural problems of securing damages which existed in many states. Moreover, section 301 gave some states the legal basis for breach of contract actions against unions where none had previously existed. Some states, generally those more industrialized and, thus, more organized, had "little Norris-LaGuardia Acts" which already barred injunctions in certain circumstances. Thus, the alternative result is less ironic than it might at first appear to be. As the Court noted in Dowd, the "basic purpose of 301 was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations."39 The emphasis is on forums.

It is also quite possible that, as Clyde Summers has suggested,40 section 301 would most certainly not have passed if it had been made clear that the provision would bar state court injunctions, thereby making damages the exclusive remedy against union breaches of contract. On the other hand, it is interesting that injunctions were not discussed at all. Moreover, as already noted, the House bill would have made Norris-LaGuardia inapplicable in all section 301 cases, but this provision was not accepted by the Conference committee. Norris-LaGuardia was amended explicitly, but only in relation to the question of agency.

In retrospect, one often feels that legislators would have balked at explicit recognition of subsequent judicial creativity. In part this may be due to the inability to foresee the actual results of one's handiwork. The cause may also be the need to ignore emotional or divisive issues in order to secure passage at all. One wonders what would have occurred in 1947 if Congress had known that federal courts could not enjoin strikes in section 301 cases in 1962, or that they subsequently could in 1970. For that matter, what would have been the legislative reaction in 1947 if a savant foretold the creation of federal common law in Lincoln Mills which would lead to a broad presumption of arbitrability and limited judicial review of arbitration awards?41 Placing a

38. Id. at 63-4, 315 P.2d at 332.
40. Letter from Clyde Summers to James Atleson.
focus on what Congress would have done had they known what courts would later do with their product lets courts off the hook for what they in fact did do.

If states could enjoin, a strange terrain would be created in which the strong federal interest in uniformity preempts state substantive law, yet permits state courts, but not federal courts, to grant the most emotion-laden (and effective) remedy in labor law. Putting the removal issue to one side, would the presence of injunctive power in some states upset the very urge for uniformity that preempted state law in the first place? Traynor did not believe that uniformity was threatened because "a state court can give a more complete and effective remedy." The effectiveness of the injunction is without question, but the problem of uniformity cannot so easily be avoided. As Florian Bartosic argued in 1969, the problem can be illustrated by a hypothetical strike which occurs in a number of states. \textsuperscript{43} \textit{Sinclair} would have meant that injunctions would have to be denied in each federal court in which such actions were brought, while most (but not all) state courts would grant such an injunction, even those which had anti-injunction statutes.\textsuperscript{44}

Although injunctions were overwhelmingly granted by state courts both before and after \textit{Sinclair},\textsuperscript{45} the issue did not go unchallenged. In \textit{McCarroll}, Justice Carter argued in dissent that a state court was limited to federal remedies. He noted that the Supreme Court in \textit{Lincoln Mills} stressed that Congress had a "concern with a procedure for making such agreements enforceable in the courts by either party." Moreover, the Court had noted that section 301 provided the "necessary legal remedies."\textsuperscript{46} Indeed, one of the issues in \textit{Lincoln Mills} was the question of remedy. Primarily, however, Carter argued that the injunction is a crucial remedy, not a mere question of procedure.\textsuperscript{48}

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\begin{enumerate}
\item[42.] \textit{McCarroll}, 49 Cal. 2d at 64; 332 P.2d at 332-33.
\item[44.] Moreover, employers could seek an injunction in a state court yet sue for damages in federal court. Bartosic, supra note 43, at 1008 & n.180.
\item[45.] Approximately 36 states, it is believed, provided injunctions for strikes in breach of contract when \textit{Boys Market} was decided. \textit{Boys Market}, 398 U.S. at 247 n.15. Even after \textit{Sinclair}, Bartosic found that at least eleven states had enjoined strikes in breach of contract, four in the face of anti-injunction statutes. The latter either rely upon a statutory exemption or, as in New York, interpret such strikes as not constituting a labor dispute. Bartosic, supra note 43, at 1001, 1002 n.138.
\item[46.] \textit{Lincoln Mills}, 353 U.S. 453.
\item[47.] \textit{Id.} at 455.
\item[48.] See Fields, \textit{Injunctive Relief in State Courts for Breach of a No-Strike Clause}, 2 LOY. L.A.L. REV. 122, 123-30 (1969). In \textit{Avco} the Sixth Circuit held that removal could not be avoided by framing the employer's right as a state right, thereby avoiding the effect of \textit{Sinclair}. The Supreme Court unanimously affirmed, but failed to pass on the 6th Circuit's conclusions that states had no power to enjoin in § 301 cases and, moreover, that federal courts were required to dissolve state court injunctions after removal. 390 U.S. at 560 n.2, 561 n.4.
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JUDICIAL INVENTIVENESS

McCarroll was cited with approval and without further analysis by the Court in Boys Market. Also cited was Shaw Electric Co. v. IBEW, which upheld state equitable power after Sinclair. Shaw, however, was even more weakly reasoned. The Pennsylvania court noted, first, that section 301 left the Norris-LaGuardia Act unchanged. Not only was the question begged, but the court overlooked the Conference committee’s rejection of the House bill which excluded the application of Norris-LaGuardia to section 301 actions. Second, the court quoted the statement that the enforcement of section 301 would be left to the “usual processes of law,” a statement, however, which was designed only to explain why the Conference rejected the Senate bill’s provision making a breach of contract an unfair labor practice. Finally, the Pennsylvania court recognized the problem of uniformity but assumed that this concern applied only to the interpretation of the substantive provisions of the agreement.

It certainly can not be said that injunctions against strikes are peripheral to the federal concerns in labor relations or to the law of collective agreements. In addition, injunctions can hardly be deemed “procedural” matters which are not within the scope of federal preemption. Indeed, there is a stronger argument for the opposite position. Those other federal laws from which the Court would devise the law of section 301 would have to include the Norris-LaGuardia Act. Since the Supreme Court empowered itself to create section 301 law, it could easily hold as a matter of federal law that the strictures of the Norris-LaGuardia Act had become part of the law of section 301 and, thus, binding on the states.

Such a conclusion flows from the importance of the injunction in American labor history as much as from the continued willingness of courts to believe that strike injunctions merely hold the “status quo” rather than realistically determine the dispute. As Professor Aaron has stated, it has been

noted by all competent students of industrial relations, that in labor disputes the injunction remedy is inextricably linked with the rights of the parties involved; a strike may be won or lost, depending upon whether the employer’s application for a temporary injunction or a temporary restraining order succeeds or fails.

The purpose of Norris-LaGuardia, to restrain the issuance of injunc-

50. Id. at 9, 208 A.2d at 773.
51. Id.
52. Id. at 10-11, 208 A.2d 774-75.
tions in "justifiable" as well as unjustifiable situations, obviously applies to state courts as well as federal courts. The zeal of state courts is no more apparent than in New York where what appears to be a strict anti-injunction statute is routinely finessed, for instance, by holding that a breach of contract strike does not constitute a "labor dispute."\(^5\)

The fear of judicial abuse is clearly present. Professor Aaron found that a judge will typically entertain the application in an ex-parte proceeding, possibly on the basis of affidavits and argument, without testimony. It is safe to assume that in most instances he will have only slight familiarity, if any, with industrial relations practice; and frequently, he will have only a meager knowledge of labor law. Add to these disadvantages a crowded docket prompting a perfectly natural desire to get rid of the case, and it becomes apparent that there is little chance that the judge will probe deeply enough beneath the plaintiff's allegations and the defendant's answers and become sufficiently well informed about the case to reach a reasonable judgment concerning the need for a restraining order.\(^5\)

The Supreme Court in *Boys Market* assumed that state courts could enjoin and, apparently, that federal courts upon removal were obliged to quash those injunctions. It is only with these assumptions that the Court could say that the federal policy of uniformity was threatened by the existing state of the law. Some lack of uniformity, it was forced to recognize, stems from having more than one court and, indeed, from the Court's holding that states had concurrent jurisdiction with federal courts. More humorously, the very problem the Court was really concerned with was a disturbing uniformity, that is, after removal, federal courts routinely quashed state court injunctions. And, said the Court, recognizing the great importance of the injunction as a "remedial device," its "availability or nonavailability in various courts will not only produce rampant forum shopping and maneuvering from one court to another but will also greatly frustrate any relative uniformity in the enforcement of arbitration agreements."\(^5\)

Again, of course, the majority was not really concerned with either forum-shopping or the lack of uniformity for existing law created a practical kind of uniformity as well as a reduced need for forum-shopping.\(^5\)


\(^5\) *Boys Market*, 398 U.S. at 246.

\(^5\) Another argument was that the removal procedure was never designed to "foreclose completely remedies otherwise available in the state courts." *Boys Market*, 398 U.S. at 246. Again, the concern assumes state court power to enjoin. Of course, the removal procedure is still open to respondents even after *Boys Market*. 
Justice Brennan did acknowledge that these "objections" could just as easily be remedied by applying Norris-LaGuardia to the states as they could by overruling *Sinclair*. This possibility, however, was easily dismissed by quoting Justice Traynor to the effect that "[w]hether or not Congress could deprive state courts of the power to give such [injunctive] remedies when enforcing collective bargaining agreements, it has not attempted to do so. . . ." 58 So much for this possible resolution.

The conclusion seems clear, especially in an opinion written by Justice Brennan, that something else must be at stake than the interest in uniformity. Indeed, relying on the "quid pro quo" notion, Brennan stated that *Sinclair* has "devastating implications for the enforceability of arbitration agreements and their accompanying no-strike obligations . . . ." 59 The Court's belief that no-strike promises must be enforced by injunction lies at the heart of *Boys Market*. It should be noted that Brennan was saying that *Sinclair*, in deferring to a congressional statute, would upset the judicially created policies of the Court in section 301 cases. Unions promise to arbitrate disputes, yet such a promise does not necessarily mean they foreshew self-help over these matters. Yet, the Court has relied upon this very assumption. When there is an explicit no-strike clause, as in *Boys Market*, is an injunction necessary to protect the employer's bargain? Interestingly, this argument is made by the majority in *Boys Market* and the dissent in the later *Buffalo Forge* decision. 60

But what is the bargain? The union in *Boys Market* indeed promised not to strike and the breach of this promise could lead to a damage award. Moreover, employees who strike are subject to discharge because a strike which violates a no-strike promise is considered unprotected. But surely the particular parties involved in *Boys Market* did not assume that injunctions were available to enforce their no-strike clause since the Court had made it clear in 1962 that federal courts, at least, could not issue such injunctions. Injunctions, as an equitable remedy, were in a real sense extraneous to the "bargain" before the Court in *Boys Market*. That the union promised not to strike in the absence of an injunctive remedy is no more odd than the fact that prior to section 301 even damages could often not be obtained for a breach of a collective agreement. And since, as the Court continually reminds us, collective agreements should not be treated as normal contracts, the absence of the full panoply of normal remedies should not be shocking. A "voluntary" promise not to strike, like any promise, may be enforced

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58. *McCarroll*, 49 Cal. 2d at 63, 315 P.2d at 332.
in a variety of ways, but the available legal remedies are a matter of public determination.

Brennan also relies upon the standard argument in section 301 cases: the availability of injunctive remedies is required to encourage employers to agree to arbitration clauses. More puzzling is the evidence, surely made available to the Court, that arbitration had gained wide acceptance, even during the period when Sinclair prevented strike injunctions. The incidence increased steadily since 1945 so that in 1964, two years after Sinclair barred injunctions as a remedy, the Bureau of Labor Statistics found that 94% of agreements studied contained arbitration clauses. Indeed, the inclusion of arbitration clauses had grown after Sinclair!

Boys Market, therefore, seems to be based primarily on the Court’s belief that there is no substitute for an immediate halt to an unjustifiable strike and that damages are an ineffective deterrent. That injunctions are the most effective means to end a strike has long been known, even in 1930 when the Norris-LaGuardia Act was enacted. The injunction is the most effective remedy for the employer, although the Court’s holding rests upon its stated belief that such a result is necessary to defend the integrity of arbitration agreements.

It is sometimes said that strikes are inconsistent with arbitration either because strikes are inconsistent with the Union’s promise to arbitrate, which assumes the answer, or because strikes place pressure upon the arbitrator. Although most arbitrators strongly support Boys Market, I know of none who would assert that his or her decision would be affected by the existence of a strike. This does not mean, of course, that arbitrators are not affected or that a strike may not force an employer to concede an issue upon which it could prevail in arbitration. This concern about the enforceability of rights is surely commendable, but it occurs in an area where, for instance, unions commonly challenge employer actions in arbitration, a process whose long resolution time may nullify any union victory, and which evinces little concern for the enforceability of employee and union rights in non-arbitration contexts.

It is true that a strike could force an employer to alter the criticized behavior, behavior which would be the focus of arbitration and which might be determined contractually proper. Perhaps this concern lies

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61. Although it is often the employer who objects to the inclusion of such a clause, primarily because of a fear of a loss of control rather than the unavailability of enforcement remedies, the notion assumes that only unions have a positive interest in arbitration clauses. The Court also assumes that only employers have an interest in obtaining a no-strike clause.


63. See Amalgamated Trans. U. Div. 1384 v. Greyhound Lines, 550 F.2d 1237 (9th Cir. 1977) (presumption that arbitration process will be significantly impaired by strike but not by employer breach).

64. See J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).
behind Boys Market. It is a view which opts for a certain type of dispute resolution, perhaps one more "middle class" than "working class." Yet, the threat of economic pressure or resistance constantly affects the behavior of unions and employers. The arbitration process, after all, is part of the collective bargaining process, a process which the Court has told us involves both good faith bargaining and the presence of weapons. Thus, a union may bargain in good faith even if concurrently it is engaging in an unprotected slowdown. The Boys Market majority must assume that although weapons are "part and parcel" of the bargaining process, arbitration, although clearly part of the same process, must be treated differently when economic pressure is involved. Indeed, much of labor law distinguishes between the making of contracts and the enforcement of contracts. The use of self-help is apparently proper only in the former situation.

The circle of Boys Market arises from its recent clarification in Buffalo Forge that only strikes over arbitrable matters may be enjoined under section 301. That is, injunctions are proper only where the underlying dispute is arbitrable. Other strikes may not be enjoined because of the enduring vigor of Norris-LaGuardia. If the underlying dispute cannot be resolved by arbitration, no injunction can be obtained because the collective action does not threaten the arbitral system. Thus, a sympathy action could not be enjoined even though the strike itself may be in violation of a contractual no-strike promise. The Court's holding stressed that Boys Market was based on a clear policy of barring strikes which would "frustrate the arbitral processes . . . ." In other cases, the Norris-LaGuardia Act still applies to restrict federal judicial power.

Buffalo Forge also raises the common question of who is to bear

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65. This objection assumes the employers' right to proceed on a course which is permitted by the agreement without having to face employee pressure. Without a no-strike promise, however, there is no suggestion that section 7's right to strike may only be employed against unlawful or otherwise objectionable behavior. From the reverse perspective, most of labor's statutory rights can be substantially restricted by employer counteraction. Thus, the employer can permanently replace strikers or can preempt the strike by a lockout.


67. Of course, the Court has conceded that it would recognize, although reluctantly, a clause which explicitly granted the Union the right to strike over arbitrable matters. See Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974). See also Atleson, Threats to Health and Safety: Employee Self-Help Under the NLRA, 59 MINN. L. REV. 647 (1975); Atleson, Work Group Behavior and Functions of Industrial Disobedience, 34 OHIO ST. L.J. 751 (1973).


69. Id. at 407.

70. The 4-judge dissent argued that only part of the quid pro quo was now enforceable, an argument which assumes more about the intentions of the parties than the record usually shows in these cases. Id. at 413. See also Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702 (1982) (work stoppage for political reasons held not enjoinable).
the costs of delay and the risk of judicial error. If no injunction can be granted, and an arbitrator subsequently holds that the strike constituted a breach of the agreement, then the employer has suffered the kind of intervening harm the Court would prefer it had not. But the reverse cost is often ignored. If the arbitrator after an injunction is granted decides that the strike did not violate the agreement, that is, the strike did not violate the union's no-strike promise, then activity has been wrongfully enjoined. This risk is common yet it surely is deeply implicated in the policies of the Norris-LaGuardia Act. The problem in 1930, and to an undetermined extent now, is that many judges still feel that injunctions only hold the status quo and do not resolve the merits. It is true that employer decisions may be overturned in arbitration, so the problem of an injunction's effect on the outcome of a dispute is less severe than in non-contractual contexts, but the costs of error are still present.

With this long prologue we can now turn to the problem. Suppose an injunctive proceeding is begun in state court and, for some reason, is not removed to federal court. Assume further that the strike is not over an arbitrable grievance and, thus, a federal court could not enjoin the activity given Buffalo Forge. May the state court enjoin because Norris-LaGuardia is not applicable to state courts? If it can, then the very same problems which seemingly bedeviled Brennan in Boys Market reappear because unions will remove to federal court to avoid the broader state injunctive power. In other words, the existence of a potentially broader zone for injunctive action in state courts recreates the "problems" allegedly thought so serious in Boys Market. If, on the

71. See, e.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978), where the majority stressed the inability of employers to test the "arguably protected" side of the Garmon preemption standard while ignoring the risks to federally protected interests caused by state court action.

72. By a process similar to that used in Sears, the Court could finesse this potential cost by assuming that most midterm strikes breach the agreement.

73. See, one painfully must cite, F. Frankfurter & N. Greene, The Labor Injunction (1930).

74. This hypothetical could be stated in a somewhat reverse fashion. Assume an employee seeks an injunction against an alleged breach of a no-strike clause in a state which has a "little" Norris-LaGuardia Act. The union's defense relies primarily upon the state's statutory restrictions on the granting of injunctions. The employer relies upon § 301, arguing that 301 and its remedies (including the judicial narrowing of Norris-LaGuardia) supercede state law. If the court holds steadfast to state law, then state remedial power even after Boys Market could ironically be narrower than that available in a federal court. If the employer succeeds, on the other hand, on the theory that the federal common law of collective bargaining agreements applies to state courts, then § 301 has broadened the remedies available under the state's own law.

75. See Sheet Metal Workers v. Seay, 693 F.2d 1000 (10th Cir. 1982), modified and reh'g denied, 696 F.2d 780 (10th Cir. 1983), where the court, relying on Avco Corp., refused to remand to a state court after removal because of the employer's argument that the federal court could not enjoin after Buffalo Forge. The problem was noted by Justice Stevens in his Buffalo Forge dissent, 428 U.S. at 423 (1976). See also Fields, supra note 48, at 122.
other hand, the state court cannot enjoin, then it must be because the Norris-LaGuardia Act, even as narrowed by the Court in section 301 cases, has substantively become part of section 301 law and, as such, is binding on state courts. Yet this is the very proposition rejected by the Court in Boys Market.

Should the hypothetical case arise, either state courts can give a wider range of injunctions than can federal courts, leading back to the removal “problem” stressed by the Boys Market majority, or state courts cannot enjoin because Norris-LaGuardia is read as part of the developing federal common law of section 301. The situation highlights the problems caused by masking value choices in cases like Boys Market. If the problem of protecting state power was truly significant, the Court could either apply the Buffalo Forge doctrine to the states, thereby creating federal-state uniformity, or it could overrule Buffalo Forge, creating a different kind of uniformity. The first option was rejected in Boys Market because of expressed concern for state autonomy, and its subsequent rejection would help unmask the valuation in Boys Market. Yet, the concern expressed in Buffalo Forge about the costs of judicial intervention and substantive effects of even temporary injunctions surely militates against permitting state courts a wider range of intervention than federal courts possess.

It is surely possible that the current Court will overturn Buffalo Forge, making injunctions available for breaches of no-strike promises even if the strikes are not caused by arbitral issues. As the critics of Buffalo Forge have argued, Norris-LaGuardia does not distinguish between strikes in response to arbitrable grievances and strikes in response to nonarbitrable grievances. If uniformity is deemed more important than the protection of state power, the Court could do nothing, for unions would simply remove this type of state injunctive action to federal court. The hypothetical problem, therefore, creates the same set of issues presented by Boys Market.

Given the volume of published criticism of the Buffalo Forge decision, I wish merely to suggest that much of the existing problem stems from the shaky doctrinal foundation of Boys Market. Admittedly, Boys Market is certainly a logical result of the process which began in Lincoln Mills and was fleshed out in the famous arbitration trilogy. It is

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76. I understand that there is a difference between barring all injunctions and restricting, but not totally preventing, the issuance of an injunction. In a Buffalo Forge type case, however, the difference vanishes. Moreover, the effect on state authority would be the same because unions will exercise their right to remove to federal court.

77. The Court could also hold that federal courts may not quash a state injunction even though the federal court could not initially have granted an injunction. The Court’s failure to deal with this in Boys Market suggests that the issue is not a difficult one to resolve. Moreover, this result would encourage forum shopping since employers would seek injunctions in state courts rather than federal courts. This result would obtain if state courts had a broader equitable power.
also true that unions generally agree to no-strike promises, but they do not necessarily agree thereby to waive the protection of the Norris-La-Guardia Act. Buffalo Forge's unintentional creation of the same state-federal problem allegedly disturbing the Court in Boys Market highlights the fictitiousness of the doctrinal argument in Boys Market. Even more serious is the reliance upon judge-made law to undercut statutes, especially those designed to avoid judicial excesses. It is also possible to avoid the problem raised here, as Judge Traynor did in McCarroll, by stressing that section 301 was designed to supplement state jurisdiction. Yet, hardly anything the Court has done in interpreting section 301, from Lincoln Mills onward, was based on congressional guidance of any kind. It is this kind of free-wheeling judicial policymaking, and not legislative intent, which explains Boys Market.

The Court could, of course, overturn Buffalo Forge, but to do so it would have to jettison what I believe is the doctrinal basis of the section 301 cases. The key seems to be that the arbitration clause is being enforced, not the no-strike clause. To "imply" (as in Lucas Flour) a no-strike promise concurrent with an arbitration clause only means that the Court assumes that a union which promises to arbitrate also promises to deal with those matters in no other way. Thus, the absence of a no-strike promise in Gateway Coal, for instance, is irrelevant.

Professor Summers has argued that the connection of the injunction to the arbitration process in Boys Market was artifical. In the absence of arbitration, contractual disputes would be decided by a court, and a strike would equally frustrate the judicial process or the arbitration process. My problem is understanding how a strike necessarily frustrates either process, but if this argument is accepted, then Boys Market is correct in result and Buffalo Forge is wrong.

To enjoin a strike pending arbitration, however, would force the Court to consider Boys Market-type injunctions against employers. These injunctions, granted to stay employer actions pending arbitration, were granted by lower courts after Boys Market but are now more

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78. For a similar area of concern, see Atleson, Disciplinary Discharges, Arbitration & NLRB Deference 20 BUFFALO L. REV. 355 (1971).

79. Buffalo Forge was a 5-4 case, and given the support of much academic criticism, it is not inconceivable that the decision, although fairly recent, will be reversed. The two most likely departures from the Court, however, Brennan and Marshall, were dissenters in Buffalo Forge.


81. Letter from Clyde Summers to James Atleson.

difficult to obtain after Buffalo Forge. To bar employer actions which alter working conditions pending arbitration would, of course, greatly protect the "integrity" of arbitration provisions.\textsuperscript{83} And it would also presume a mutual relationship, invoking a more equal participatory relationship than the Court has thus far been willing to countenance.\textsuperscript{84} Indeed, the broad presumption that all disputes are arbitrable unless exceptions are clear, a presumption which already constrains employers in arbitrability disputes, would seriously limit employer freedom to act unilaterally. This surprise cost of the Trilogy to employers just as the \textit{quid pro quo} notion affects unions by viewing no-strike promises to be at least as broad as arbitration clauses.\textsuperscript{85} One result of the Court's \textit{quid pro quo} notion, then, is that it may be faced with an issue which directly confronts the unequal relationship which the law itself has helped to create.\textsuperscript{86}

Because of the Court's primary concern with the arbitration

\textsuperscript{83} "[T]he courts have extended the Boys Market exception to embrace employer behavior which has the effect of evading a duty to arbitrate or which would otherwise undermine the integrity of the arbitral process." Aluminum Workers Union Local No. 215 v. Consolidated Aluminum Corp., 696 F.2d 437, 441 (1982). The post-Boys Market decisions generally agreed upon the criteria for determining the propriety of a union's status-quo request. Unlike the strike injunction situation, however, the crucial factor is whether injunctive relief is necessary to protect the arbitration process itself. Thus, an injunction would be appropriate where an employer's action prior to an arbitrator's ruling would have the effect of "rendering the arbitral process a hollow formality... where, as here, the arbitral award when rendered could not return the parties substantially to the status quo ante." Lever Bros. Co. v. Chemical Workers, Local 217, 554 F.2d 115, 123 (4th Cir. 1976).

Injunctions have been granted where employers intended to implement major changes which would present the arbitrator with an irreversible situation. Thus, injunctions have been granted where an employer intended to close a plant and move production to another location, Lever Bros, \textit{id}; close a part of an operation, Bakery Drivers Local 802 v. S.B. Thonias, Inc., 99 L.R.R.M. (BNA) 2253 (S.D.N.Y. 1978); or liquidate assets when pending grievances existed involving potential monetary liability. Teamsters Local 71 v. Aker Motor Lines, Inc., 582 F.2d 1336 (4th Cir. 1978), cert. denied, 440 U.S. 929 (1979).

84. Eileen Silverstein has perceptively noted that this view of \textit{quid pro quo} notion may focus upon the least significant aspect of the union-employer relationship. Since the union has under § 7 only the right to strike over mandatory subjects of bargaining, the no-strike promise waives only the right to strike over such subjects. Thus, the "reciprocal obligation to use arbitration never contemplates arbitration over 'entrepreneurial' decisions." Letter to author. There is a difference, of course, between the scope of § 7 and the scope of a no-strike promise, especially since a breach of such a promise can lead to damages even if the activity is also unprotected by the NLRA. It is accurate, however, to stress that both the scope of bargaining and § 7 have been limited so as not to interfere with managerial freedom. See generally J. AFLERSON, VALUES & ASSUMPTIONS IN AMERICAN LABOR LAW, supra note 64, especially chapter 3, 5 and 7. Thus, the \textit{quid pro quo} notion assumes a particular approach to certain types of disputes, but the notion exists in a larger context which assumes an already seriously unequal relationship.

85. The basic assumption in arbitral law is that the employer acts and arbitration is available to question that action. The analogous situation under § 301 would be that the reverse Boys Market injunctions would presumably not be readily available unless the integrity of the arbitration process is threatened.

clause, *Buffalo Forge* is more consistent with the post-*Lincoln Mills* rulings than its critics are willing to assume. In any event, the weaknesses of that decision should not deflect attention from *Boys Market* itself, a decision whose analysis may return to haunt the Court. The story, which could be retold repeatedly with respect to various episodes in American labor law, reveals the costs of judicial inventiveness un-guided by legislative enactments. This problem is especially serious when the creation of legal rules based on judicially ordained values results in the modification of a statute designed precisely to restrict judicial policymaking.