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## The Meaning and Contemporary Vitality of the Norris-LaGuardia Act

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Matthew W. Finkin\*

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*George William Norris represented Nebraska's 5th congressional district from 1903 to 1913, and then the state as a United States Senator from 1913 to 1942, in all but his last term as a Republican. He was known, as his autobiography is titled, as The Fighting Liberal. He was a powerful advocate for the New Deal. He fought for the Rural Electrification Act and the creation of the Tennessee Valley Authority—the latter earning him both a dam and a town bearing his name: Norris, Tennessee. He was a sponsor of the law that also bears his name, the Norris-LaGuardia Act, of which he later wrote: it is a "law that attempts to safeguard and protect the liberties of the individual man." It is a law whose meaning and relevance have come into question today. The author is gratified that the editors of the Nebraska Law Review have chosen to devote its pages to reflect on what Norris's work continues to say to us, eighty years after its passage.*

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\* Professor of Law, the University of Illinois. This is revised and expanded from *The Privatization of Workplace Justice and the Atomization of the American Worker*, to appear in a Festschrift for Professor Rolf Wank, edited by Professors Martin Hensler, Martin Maties, and Ulrich Preis, to be published by C.H. Beck.

## I. INTRODUCTION

Ms. Tiffany Ryan took a job with JPMorgan Chase & Co. in 2010. As a condition of employment she was required to sign a Binding Arbitration Agreement. It was a six-page, single-spaced document that provided in pertinent part:

As a condition of and in consideration of my employment with JPMorgan Chase & Co. or any of its direct or indirect subsidiaries, I agree with JPMorgan Chase as follows:

1. **SCOPE:** Any and all “Covered Claims” (as defined below) between me and JPMorgan Chase . . . shall be submitted to and resolved by final and binding arbitration in accordance with this agreement.

2. **COVERED CLAIMS:** “Covered Claims” include all legally protected employment-related claims, excluding those set forth below in Paragraphs 3 and 4 of this Agreement, that **I now have or in the future may have** against JPMorgan Chase or its officers, directors, shareholders, employees or agents which arise out of or relate to my employment or separation from employment with JPMorgan Chase and all legally protected employment-related claims that JPMorgan Chase has or in the future may have against me, including, but not limited to, claims of employment discrimination or harassment if protected by applicable federal, state or local law, and retaliation for raising discrimination or harassment claims, failure to pay wages, bonuses or other compensation, tortious acts, wrongful, retaliatory and/or constructive discharge, breach of an express or implied contract, promissory estoppel, unjust enrichment, and violations of any other common law, federal, state, or local statute, ordinance, regulation or public policy, including, but not limited to Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, Section 1981 of the Civil Rights Act, and the Worker Adjustment and Retraining Notification Act.

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4. **CLASS ACTION/COLLECTIVE ACTION WAIVER:** All Covered Claims under this Agreement must be submitted on an individual basis. **No claims may be arbitrated on a class or collective basis** unless required by applicable law. Covered Parties expressly waive any right with respect to any Covered Claims to submit, initiate, or participate in a representative capacity or as a plaintiff, claimant or member in a class action, collective action, or other representative or joint action, regardless of whether the action is filed in arbitration or in court.<sup>1</sup>

It is not surprising that she would be required to agree. The substitution of company-created arbitration systems for the courts has become a fixture of the American economy. Employers see legal and efficiency benefits in it: the process is confidential, avoiding precedent, and thought to be faster and less expensive than judicial litigation. As

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1. This agreement was at issue in *Ryan v. JPMorgan Chase & Co.*, 924 F. Supp. 2d 559 (S.D.N.Y. 2013). It is only partially excerpted in the opinion. The full text is available at *Binding Arbitration Agreement*, JPMORGAN CHASE & CO., <http://www.jpmorganchase.com/corporate/Home/document/JPMCArbAgreement.pdf> (last visited Feb. 12, 2014), *archived at* <http://perma.unl.edu/VT6H-TUTA>.

much as a third of the workforce is covered by such provisions.<sup>2</sup> This explains the sweep of section 2. However, because the conventional wisdom is that the disposition of a large number of common small claims in a single proceeding is more efficient than proceeding piecemeal on them, the precise purpose served by section 4 is rather in need of explanation.<sup>3</sup>

In any event, the legal question it poses is whether employment can be conditioned contractually upon the individual's surrender of the capacity to bring or participate in a class or a group proceeding in the forum substituted for the courts. The answer requires an engagement with two laws. One, a sedate matter of commercial law, was presented to Congress at the end of 1921, and culminated in early 1925, with no real dispute, in the Federal Arbitration Act.<sup>4</sup> The other involved a struggle over labor law that played out over decades—in the state legislatures, the courts, and in intense public debate—and which took a decisive turn in the Norris-LaGuardia Act of 1932.<sup>5</sup>

## II. A TALE OF THREE LAWS

### A. The Arbitration Act (1925)

In 1921, the American Bar Association's (ABA) Committee on Commerce, Trade and Commercial Law drafted a proposed federal arbitration statute as part of a comprehensive package—a uniform state law and an international treaty—intended to expedite the resolution of commercial disputes. At the time, many state courts were disinclined to enforce agreements to arbitrate future disputes, and the ABA sought to sweep that aside. The law was introduced in Congress in December, 1921. A hearing before the relevant Senate committee was held at the end of January, 1923. In the interim, the bill had drawn the opposition of organized labor and the endorsement of the then-

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2. Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011); see also Ariel Avgar, J. Ryan Lamare, David Lipsky & Abhishek Gupta, *Union and ADR: The Relationship Between Labor Unions and Workplace Dispute Resolution in U.S. Corporations*, 28 OHIO ST. J. ON DISP. RESOL. 63 (2013) (examining the role of unions in the widespread adoption of alternative dispute resolution mechanisms, including arbitration, by corporations in developed and developing nations).

3. See Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103.

4. Pub. L. No. 68-401, 43 Stat. 883 (codified at 9 U.S.C. §§ 1–15 (2012)). The law was termed “The United States Arbitration Act” at the time. It was codified into the United States Code in 1947 and renamed the “Federal Arbitration Act.” The history of codification is described by Wesley Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 580–81 n.1 (1952), in a symposium on *Commercial Arbitration*.

5. Ch. 90, 47 Stat. 70 (codified at 29 U.S.C. §§ 101–15 (2012)).

Secretary of Commerce, Herbert Hoover. The union opposition was noted in the Senate's hearing,<sup>6</sup> an employment-exempting proviso, submitted by Secretary Hoover, was adopted,<sup>7</sup> and the bill was enacted.

The key section provided that, subject to the employment exemption, a written agreement to submit to arbitration a controversy arising out of a transaction involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the reservation of any contract."<sup>8</sup> As the Supreme Court was later to opine, Congress enacted the law "to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"<sup>9</sup>

### B. The Norris-LaGuardia Act (1932)

The Arbitration Act dealt with an issue of commercial law. Its passage was relatively swift and uncontroversial, save for the hiccup resulting in the employment exemption. The Norris-LaGuardia Act engaged with one of the most controversial issues of the time. Its passage was stormy; its terms were subject to intense dispute.

Stefan Riesenfeld pointed out that all industrialized democracies have followed a common legal trajectory when they confronted collective employee protests and demands for collective bargaining: suppression, tolerance, recognition.<sup>10</sup> At the century's turn, the United States was still in the first phase. The flashpoint of dispute was often

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6. In the hearing, the ABA's witness, W.H.H. Piatt, was asked if he was aware of the union objection. In response, he echoed the exempting language Secretary Hoover had submitted, *see infra* note 7, and added:

It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

*Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary, 67th Cong. 9 (1923)* (statement of W.H.H. Piatt, Rep., American Bar Association).

7. That "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2012). The background and meaning of this provision is discussed by Matthew Finkin, "Workers Contracts" *Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996).

8. 9 U.S.C. § 2 (2012).

9. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (alteration in original) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

10. Stefan Riesenfeld, *Recent Developments of French Labor Law*, 23 MINN. L. REV. 407, 409 (1939). Actually, he proposed a fourth stage: support. *Id.*

not over specific wage demands but whether employers would deal with their employees on a collective basis, through their unions. All too often the confrontation was lethal: the Ludlow Massacre of April 20, 1914, which took the lives of twenty-four men, women, and children;<sup>11</sup> the Matewan Massacre in West Virginia on May 19, 1920, which led to the Mingo County War that, at one point, involved a confrontation between 10,000 armed miners, more or less, and the mine owners, until President Harding placed the entire state under martial law;<sup>12</sup> and the Herrin Massacre of June 22, 1922, in southern Illinois in which, after a gunfight, about twenty-five (no one knows for sure) non-union miners were captured and slaughtered, some having their throats slit.<sup>13</sup>

In the last quarter of the nineteenth century, “American labor relations were the most violent in the Western world with the exception of Russia.”<sup>14</sup> As in the last third of the nineteenth century so, too, in the first third of the twentieth.

Under the constitutional warrant of the *Hitchman Coal* decision (1917), which validated the yellow-dog contract in a West Virginia case . . . newly formed open-shop associations urged employers to remove the gloves and fight unions with strikebreakers, private police, and federal troops. Many employers did not hesitate to bring in thugs and gunmen from professional strikebreaking outfits such as the infamous Bergoff, Corporations Auxiliary, and Baldwin-Felts detective agencies, whose “nobles” (guards) and “finks” (strikebreakers) frequently touched off a melee of riot and killing.<sup>15</sup>

A peaceful weapon of choice by employers against collective action was the labor injunction.<sup>16</sup> It could be secured *ex parte* and was often drafted in such broad and vague terms as to sweep in almost any conduct or speech that could lend aid in or comfort to the collective effort. The employer could also require an individually-executed contract by which the employee agreed to refuse to become a union member or to

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11. HOWARD GITELMAN, *LEGACY OF THE LUDLOW MASSACRE* 1 (1988).

12. DAVID CORBIN, *LIFE, WORK, AND REBELLION IN THE COAL FIELDS: THE SOUTHERN WEST VIRGINIA MINERS, 1880–1922* 195–235 (1981).

13. U.S. COAL COMM’N, *REPORT OF THE UNITED STATES COAL COMMISSION*, S. DOC. NO. 68-195, pt. 1, at 164–67 (1925).

14. G. WILLIAM DOMHOFF & MICHAEL J. WELLER, *CLASS AND POWER IN THE NEW DEAL* 67 (2011) (citation omitted). As they note, “[b]etween 1877 and 1900, American presidents sent the U.S. Army into eleven strikes, governors mobilized the National Guard in somewhere between 118 and 160 labor disputes, and mayors called out the police on numerous occasions to maintain ‘public order.’” *Id.* (citations omitted). Private militias were assembled, trained, and compensated by employers hostile to unionization. *Id.* at 68. In 1890, the Pinkerton Detective Agency had 30,000 regular and reserve forces available to break strikes. *Id.*

15. ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* 236 (1991) (citation omitted).

16. *See generally* IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920–1933* 391–415 (1960).

engage in a wide variety of other concerted activities;<sup>17</sup> in labor parlance, a “yellow dog contract.” A word on it.

Agreements under which employees abjured union membership or support were known in England in the 1830s. They were referred to as “the document,” and became known as such in the United States—as the “Infamous Document” among Fall River, Massachusetts, textile workers in 1875.<sup>18</sup> The term came to be applied to “obnoxious house leases” used by coal companies which gave the employer the right to enter the premises at any time and remove any person the company found objectionable.<sup>19</sup> The two provisions were often conjoined, but by the 1920s, the term had become applied only to the employment component, and became tinged as well with the odium of strikebreaking.<sup>20</sup>

In 1906, the Hitchman Coal & Coke Company informed its workers that “the mine would be run non-union, and the company would deal with each man individually.”<sup>21</sup> Accordingly, the workers were required to sign a contract that provided that the employee would not join the union or make any effort to unionize. Because the miners held their jobs on an at-will basis they could be discharged for joining or supporting a union or for seeking collective address to their grievances. The contract added nothing to the employer’s prerogative in that regard. But if it were a lawful contract, any effort by a union to secure support among those who signed it would be an inducement to its breach and so subject to injunction.<sup>22</sup> The legality of the agreement was presented to the Supreme Court. The Court had no doubt that the contract was lawful: freedom of contract permeated the period as, in the Court’s words, an inextricable “part of the constitutional rights of personal liberty and private property.”<sup>23</sup> As a result, the individual contract could be deployed to blunt any effort by a union to

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17. *See infra* text accompanying notes 42–45, 82–83.

18. JOEL SEIDMAN, *THE YELLOW DOG CONTRACT* 17 (1932).

19. *Id.* at 31.

20. Note the remembrance of Tom Luketich of a miner’s strike in Cokeburg, Pennsylvania, in 1925: The mine owners

brought “yellow dogs” in when they were breaking the union. About 1925, they brought them “yellow dogs” in. That’s when the company put up fences around mine property. They had them little shanties for the “yellow dogs” to stay in. At every gate they put them spotlights up on the slate.

We moved out. We didn’t stay here. Our people moved out. All the Croatians moved out because they were union men. They wouldn’t scab.

JOHN BODNAR, *WORKERS’ WORLD: KINSHIP, COMMUNITY AND PROTEST IN INDUSTRIAL SOCIETY, 1900–1940* 95 (1982).

21. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 239 (1917).

22. *Id.* at 261–62.

23. *Id.* at 251.

organize employees, as the notorious *Red Jacket* injunction did in southern West Virginia.<sup>24</sup>

Progressive reformers and labor unions had sought to legislate against the asperities of the labor injunction for decades. The American Federation of Labor (AFL), making common cause with farm groups who were similarly affected by contracts with distributors forbidding them from joining agricultural cooperatives, called for congressional action as early as 1906.<sup>25</sup> Efforts were mounted at the state level as well, with limited success.<sup>26</sup>

Matters came to a head when, in 1927, the autodidact president of the International Seamen's Union, Andrew Furuseth, persuaded Senator Henrik Shipstead to introduce a bill of Furuseth's devising. All concerned, excepting Furuseth, thought it a feckless measure. But in response a subcommittee of the Senate Judiciary Committee, chaired by George Norris, invited five private persons "to come to Washington for the purpose of assisting us in framing the proper legislation to meet what we believe to be necessary in the matter."<sup>27</sup> They were Professors Francis Sayre and Felix Frankfurter of the Harvard Law School, Professor Herman Oliphant of the Columbia University Law School, then at Johns Hopkins, Edwin Witte, chief of the Wisconsin Legislative Reference Library, and Donald Richberg, a Chicago lawyer who had represented the railroad brotherhoods. Frankfurter and Sayre were active in drafting state legislation. Witte attempted to compile every labor injunction that had been handed down. Richberg was active in the drafting of the Railway Labor Act and was valued as well for his close ties to organized labor.

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24. Int'l Org., *United Mine Workers v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927). See also Peter Graham Fish, *Red Jacket Revisited: The Case that Unraveled John J. Parker's Supreme Court Appointment*, 5 LAW & HIST. REV. 51 (1987) (exhaustively treating the case and its context).
  25. PHILIP TAFT, *THE A.F. OF L. IN THE TIME OF GOMPERS* 297 (1957). See also *Limiting Federal Injunctions: Hearing on H.R. 23635 Before a Subcomm. of the Comm. on the Judiciary*, 62d Cong. (1912) (argument of Thomas Carl Spelling, Esquire); reprinted in S. Doc. No. 62-944 (1912) (arguing against the swift use of injunctions in labor relations); COMM. ON THE JUDICIARY, REGULATION OF INJUNCTIONS, H.R. REP. NO. 62-612 (1912) (detailing the history of statutes limiting the use of injunctions and proposed changes to these statutes).
  26. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 137-39, 146-47 (1930).
  27. Letter from Sen. Norris to Edwin Witte, chief, Wis. Legislative Reference Library (Apr. 21, 1928) (on file with the National Archives). Presumably, Senator Norris used identical language to write the others. Norris apologized for the inability to offer compensation for the service performed, but offered to pay the committee's ordinary witness fee—transportation expenses plus three dollars per diem, no living expenses. *Id.* The exchange of correspondence by the draftsmen is in the National Archives. The author would like to express his appreciation to David Rabban who duplicated these at the author's request many years ago.

On April 24, 1928, Frankfurter wrote to the others enclosing drafts of bills he and Sayre “have labored over a good many years and which seem to us to carry out concretely the . . . needed changes in the law.”<sup>28</sup> Enclosed were two drafts, dated April 9, 1923. One, about a page in length, dealt only with labor injunctions. It set out five sections that restricted the scope of the labor injunction, gave precedence to such cases, required prior notice and an opportunity to be heard, and required a jury trial. The other, somewhat longer, dealt more broadly with issues of labor law. It provided that no action could be rendered unlawful when done by a group that would be lawful if done by an individual, and set out substantive labor rights, e.g., peacefully to persuade another to join a labor organization any contract to the contrary notwithstanding, to picket peacefully, to engage in a non-coercive secondary boycott, and more.

The draftsmen thus confronted two distinct approaches. One, advocated in the drafting group by Sayre and supported by organized labor, was to press for substantive legal change.<sup>29</sup> The other, advocated most strongly by Witte, fearful that substantive change would never pass muster before a hostile Supreme Court, pressed for only procedural reform of the injunctive process, reserving substantive matters for another day. Even then, however, Witte saw the need to secure labor’s support; he did not see how any bill could proceed without it.<sup>30</sup>

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28. Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Edwin Witte (Apr. 24, 1928) (on file with the National Archives).

29. Sayre continued to hold to that view after the conclusion of the drafting process. Francis Sayre, *Labor and the Courts*, 39 *YALE L.J.* 682, 684 (1930) (“The cure, to be effective, must go to the root, and not simply to the legal remedy.”).

30. On November 3, 1928, Witte wrote to Senator Blaine in pertinent part:

I, personally, have very little faith in the proposed changes in substantive law in Sections 1tto [sic] 6 of the bill, although I would like to see the attack upon the “yellow dog” contracts” [sic] in Sections 2 and 3 enacted into law and tried out in the courts . . . I feel strongly that no bill is worth reporting which does not have the whole-hearted support of organized labor, including both the American Federation of Labor and the railroad men. It occurs to me, however, that it might be possible to split this bill into two parts, dealing, respectively, with the substantive and the procedural provisions.

Letter from Witte to Sen. Blaine (Nov. 3, 1928) (on file with the National Archives). On July 14, 1928, Witte wrote much the same to William Green, President of the American Federation of Labor:

I am far less confident as to the changes in substantive law, proposed in the tentative bill. The attempt to curb Yellow Dog Contracts made in Sections 2 and 3, however is distinctly worth trying. This is a new approach to this problem and one that has at least some chance of being held unconstitutional. At all events it will open the way to a reconsideration by the U. S. Supreme Court of the Hitchman Coal and Coke Company case [sic]. Inasmuch as the social aspects of Yellow Dog contracts were not brought to the Court’s attention in that case and these effects have now become much more apparent than they were ten years ago, I

The result was a compromise. The draft the group produced paid close and detailed attention to the procedural aspects of the labor injunction, for example, defining a “labor dispute” to include even a dispute between an employer and a single employee. Such substantive change as the draftsmen thought could be made and survive a hostile judiciary was placed in a statement of policy, binding in the federal courts, to be given effect as part of the express prohibition on the enforcement of the yellow dog and related contracts or “undertakings” that implicated the policy’s ends. Accordingly, section 2 of the draft, which became section 2 of the Act, declares it to be “the public policy of the United States,” that inasmuch as the individual unorganized worker “is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor,” the individual unorganized worker “shall be free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection.”<sup>31</sup>

This public policy was then to be given further effect in section 3. The draft provided:

No undertaking or promise such as is described in this section, or any other undertaking or promise contrary to the public policy declared in Section 2 of this Act, shall be enforceable or shall afford any basis for the granting of legal or equitable relief by any court of the United States . . . .<sup>32</sup>

After the draft was circulated, Richberg sent a memorandum to the group with comments suggested by the AFL. Of section 3 he wrote, “The omission of the word ‘any’ in the second [that is the above] paragraph is probably a mistake”<sup>33</sup>—as, grammatically, it was. The change was made. As enacted the section makes “Any undertaking or promise” contrary to the public policy of the United States set out in section 2 unenforceable.<sup>34</sup>

In this, the draftsmen sought to give the policy announced in section 2 the broadest possible sweep. They were well aware, as Daniel Jacoby observed, that in the aftermath of the *Hitchman* decision, “An

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think there is some possibility that the court may in effect revise the *Hitchman* case, through adopting the new approach presented in the tentative bill.

Personally, I would prefer that the substantive and procedural provisions in the tentative bill be made separate bills. This, however, we were advised by the sub-committee is undesirable from a legislative point of view.

Letter from Witte to William Green, President, Am. Fed’n of Labor (July 14, 1928) (on file with the National Archives).

31. Final Draft As Worked Out at Conference at Washington § 2 (May 1–3, 1928) (codified at 29 U.S.C. § 102 (2012)).

32. *Id.* § 3.

33. Memorandum Concerning Amendments to Anti-Injunction Bill Suggested By the American Federation of Labor, by Donald R. Richberg (no date).

34. 29 U.S.C. § 103 (2012) (emphasis added).

almost endless array of legal games were played by employers that made almost all collective action by workers susceptible to legal prohibitions.”<sup>35</sup>

We have already encountered the leases to company housing used in coal mining to which the sobriquet “yellow dog” was first applied. These came under examination by the United States Coal Commission, appointed under an act of Congress in 1922 to engage in a comprehensive examination of the industry.<sup>36</sup> Part of its report dealt with *Civil Liberties in the Coal Fields* and took up the situation of the miners who had no choice but to accept these terms were they to work, there being no other housing available. The miners, the Commission observed,

[A]re not tenants and have no more rights than a domestic servant who occupies a room in the household of the employer. The documents which pass for leases often give the company complete control over the social life of the families who live in the houses owned by the company.<sup>37</sup>

The Commission then set out the text of one such, used in Pennsylvania.

The lessee hereby further agrees not to use, allow, suffer, or permit the use of said premises, or the private ways or roads through and over other lands of the lessor used to reach said premises from the public road, for any purpose other than going in to said premises from the public road, and out from the same to said public road, by himself and the members of his family; and, further, to do no act or thing, nor suffer or cause the same to be done, whereby the public or any person or persons whomsoever may be invited or allowed to go or trespass upon said premises, or upon said private ways or roads, or upon other grounds of the lessor, except physicians attending the lessee and his family; teamsters or draymen moving lessee and his family belongings into said premises or away from the same; and undertakers with hearse, carriages and drivers, and friends, in case of death of the lessee or any member of his family.<sup>38</sup>

Of these leases the Commission opined:

Under existing laws the miners have a legal right to sign and the companies have a right to require them to sign such leases as a condition of obtaining employment. That they are ill-advised, obnoxious, and inconsistent with the spirit of free local communities hardly requires argument. Self-respecting American citizens will find a way to put an end to them. In the case of a helpless, submerged working population, the legislatures of the several States might well consider making such “leases” illegal, like any other contract which is contrary to the public interest.<sup>39</sup>

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35. DANIEL JACOBY, *LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA* 62 (1998).

36. Act of Sept. 22, 1922, Pub. L. No. 67-347, 42 Stat. 1023 (establishing the Coal Commission).

37. U.S. COAL COMM’N, *REPORT OF THE UNITED STATES COAL COMMISSION*, S. DOC. NO. 68-195, pt. 1, at 169 (1925).

38. *Id.* at 169–70 (emphasis added).

39. *Id.* at 170.

The Commission did not deal with the question of why the companies would require these extraordinary terms, but Zechariah Chafee did. Chafee, Frankfurter's colleague at the Harvard Law School, brought this aspect of the Commission's report to a broader public in an article in *The Independent* on September 15, 1923.<sup>40</sup> These leases were drafted to exclude access by or discourse with union organizers as well as strikers who had been evicted from company housing. "Certainly in a mine where working conditions were unsatisfactory, workmen would not be free to discuss their grievances in each other's houses, for fear of eviction."<sup>41</sup>

More than that, a wide variety of formulations in individual agreements proscribed all manner of concerted activities apart from union membership or support. All of these were understood to be "yellow dog" contracts. They included promises to "adjust all differences by means of individual bargaining,"<sup>42</sup> as, for example, by waitresses at the Exchange Bakery & Restaurant in New York City;<sup>43</sup> to renounce any "concerted' action [with co-workers] with a view to securing greater compensation," as at the Moline Plow Company in Moline, Illinois;<sup>44</sup> or to "arbitrate all differences" according to the machinery set up by the employer and its company union at the United Railways & Electronic Company of Baltimore,<sup>45</sup> presumably accompanied by a promise to use no other means of resolving such differences.

As Daniel Ernst points out, these devices were used mostly by small or medium-sized businesses that clung tenaciously to the "moral vision" of employment as an individual relationship grounded in freedom of contract.<sup>46</sup> "Such employers sought to mobilize on their behalf old notions about the moral value of individual decision-making in the marketplace."<sup>47</sup> Many large enterprises had abandoned that notion as anachronistic; they realized that some collective dealing was inevitable under modern conditions, but they sought to control the course of dealing through company-created employee representation plans.<sup>48</sup> Even so, as the labor economist Carroll Daugherty pointed out in 1931, inasmuch as the courts had upheld these promises "as inviola-

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40. Zechariah Chafee, *Company Towns in the Soft-Coal Fields*, *INDEPENDENT*, Sept. 15, 1923, reprinted in ZECHARIAH CHAFEE, JR., *THE INQUIRING MIND* 172 n.1, 176 n.2 (1928).

41. *Id.* at 176.

42. SEIDMAN, *supra* note 18, at 58.

43. Exchange Bakery & Rest., Inc. v. Rifkin, 157 N.E. 130, 133-34 (N.Y. 1927).

44. SEIDMAN, *supra* note 18, at 66.

45. SEIDMAN, *supra* note 18, at 69 (footnote omitted). Seidman's reference does not indicate whether the agreement dealt with collective resort to the employer's arbitration system.

46. Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917-1932*, 30 *LAB. HIST.* 251, 251-52 (1989).

47. *Id.* at 258.

48. *Id.* at 261-62.

ble, it is safe to conclude that these institutions are among the greatest strongholds of individualism today.”<sup>49</sup>

The majority of the Senate judiciary committee was not about to question that moral vision. It rejected the draft. The majority saw section 2 as invading the prerogatives of the states.<sup>50</sup> Of section 3, the majority rested on the ground that “antiunion contracts” were perfectly lawful.<sup>51</sup> There was no need for any legislation. Norris’ minority defended the draft;<sup>52</sup> the draftsmen weighed in as well in defense of their handiwork.<sup>53</sup>

In any event, no law was made in that session. But the political winds were shifting. In 1930, the nomination of Judge J.J. Parker to the United States Supreme Court failed due to his role in the by-then infamous *Red Jacket* injunction.<sup>54</sup> Despite Herbert Hoover’s opposition, Norris-LaGuardia became law in the wake of the Great Depression.<sup>55</sup>

### C. The National Labor Relations Act (1935)

Just to round out Riesenfeld’s schematic, only three years after the Norris-LaGuardia Act, Congress enacted the National Labor Relations Act, which protected employees vis-à-vis their employers from interference, restraint, or coercion in the same activities that section 2 of the Norris-LaGuardia Act insulated from judicial restraint.<sup>56</sup> In

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49. Carroll R. Daugherty, *Anti-Union Contracts*, HARV. BUS. REV., Oct. 1930, at 191, 192.

50. S. REP. NO. 71-1060, pt. 1, at 6 (1930).

51. *Id.* at 6–8.

52. *See id.* pt. 2.

53. *See* Edwin E. Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638 (1932) (discussing the passage of and support for the Act); FRANKFURTER & GREENE, *supra* note 26, at 205–28 (discussing the bill). Insofar as state rights were concerned, Frankfurter and Greene pointed out that because the federal courts adhered to the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842), pursuant to which the federal courts applied a federal common law of tort and contract independent of the law of the forum state, federal courts enjoined activity that might not be subject to injunction under state law. FRANKFURTER & GREENE, *supra* note 26, at 13.

54. *See* Fish, *supra* note 24 (discussing Parker’s failed nomination).

55. *See* STANLEY VITTOZ, *NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY* 76 (1987) (discussing the politics of passage). George Lovell also addressed the political context of the enactment of the Norris-LaGuardia Act. GEORGE LOVELL, *LEGISLATIVE DEFERRALS* 161–215 (2003). He stresses, and the exchanges among the drafters confirm, that the clarity of the statutory language was considered an imperative. *Id.* at 164. He argues further that the bill’s congressional supporters viewed clarity as necessary, perhaps critical, in the inevitable judicial confrontation. *Id.* at 165. Consequently, equal clarity of purpose was sought in the congressional debate, to confront the courts with “a policy position that had been clearly established in Congress.” *Id.* at 198. *See also infra* text accompanying notes 102–10 (discussing establishment of the policy position).

56. 29 U.S.C. § 157 (2012).

other words, the law moved from *tolerance*, forbidding the courts to give effect to any promise or undertaking that employers launched that would deny employees the right to engage in concerted activity, to *protection*, forbidding employers the power to launch them. The singular focus here, however, is on the former measure. For purposes of analysis, it would make no difference had the Labor Act never become law.<sup>57</sup>

### III. THE RUN UP TO CONFLICT: THE SUPREME COURT TRANSFORMS THE ARBITRATION ACT

At mid-century, the Arbitration Act did not allow arbitration contracts to sweep in claims of violation of public law: the performance of private promises could be given to arbitration, but public protections remained the province of the courts.<sup>58</sup> Starting in the 1980s, however, the Supreme Court began to recast the law. The Court allowed for private arbitration to subsume public law, accepting the earlier-rejected argument that what the arbitration provision did was to substitute one forum for another, the law to be applied remaining the same.<sup>59</sup> The Court then extended arbitration to claims of violation of anti-discrimination in employment law pursuant to the rules of a regulated industry.<sup>60</sup>

The Court next confronted the exemption of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”<sup>61</sup> that Herbert Hoover submitted to bring employment disputes out of the Act. In the 1920s, the Supreme Court read the power of Congress to regulate interstate commerce very narrowly: Congress could legislate only for employees who actually crossed a state border in the conduct of their work; it could not legislate for employees only whose work crossed state lines.<sup>62</sup> That narrow reading was abandoned in the wake of the New Deal, but the Court read the 1925 exemption as limited by the reading of Congressional power at the time of passage.<sup>63</sup> As a result, the Arbitration Act was read to *exclude* from coverage those employees for whom Congress could legislate, but to *include* those employees for

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57. Labor historian David Brody has ruminated that, “One could argue that the labor movement might have been better off had history stopped with Norris-LaGuardia.” DAVID BRODY, *LABOR EMBATTLED* 142–43 (2005).

58. See *Wilko v. Swan*, 346 U.S. 427, 432–38 (1953) (finding an agreement to arbitrate a claim for damages under the Securities Act of 1933 invalid).

59. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (overruling *Wilko*, 346 U.S. 427).

60. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

61. 9 U.S.C. § 1 (2012).

62. *E.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in part by United States v. Darby*, 312 U.S. 100 (1941).

63. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–18 (2002).

whom Congress had had no power to legislate at the time, which, today, amounts to most of the workforce.

There was yet more to confront the Court's expansionary arbitration policy as companies began to draft contracts that precluded the bringing of or participation in any class or group arbitration even as they precluded any judicial resort. A word of background.

The modern *Federal Rules of Civil Procedure* allow for a plaintiff to be certified as a representative of a class suffering the same wrong if some rather exacting conditions are met, to aggregate these claims in a single proceeding.<sup>64</sup> In addition, the Fair Labor Standards Act, the basic federal wage and hour law, provides for an opt-in group action whereby those similarly situated may join a lead plaintiff in making a common claim, for example, to aggregate numerous small claims of common wage cheating.<sup>65</sup> Even apart from these express class- or group-based procedural devices, it was always possible for a group of employees to band together straightforwardly as named plaintiffs in a single action to pursue a common wrong. But an arbitration agreement could be drafted to prohibit all such collective resort, as JPMorgan Chase does. Thus, the question is whether an employer may both preclude judicial resort, by substituting arbitration, and preclude group participation in the substituted, arbitral forum.

The Court took the matter up in two non-employment cases. *AT&T Mobility v. Concepcion*<sup>66</sup> concerned a sales and service agreement for a cellular telephone. The contract provided for arbitration, but only on individual basis. AT&T had advertised a "free" phone, but charged the consumer a tax (about \$30) on the basis of the phone's retail price. The Concepcions sought to bring a class action under California consumer fraud law. The lower court applied California's law of unconscionability, a doctrine applicable to all contracts, not to arbitration agreements alone, and held the class action waiver unenforceable. The Supreme Court disagreed.

The Arbitration Act places arbitration agreements on the same plane as all contracts. That is what the text says and California had applied a general doctrine of contract law not geared specifically to disfavor arbitration; but, the Court opined, that does not "suggest[] an intent to preserve state-law rules that stand as an obstacle to the accomplishment of" the Act's objective.<sup>67</sup> The "overarching purpose of the [Act]" is to ensure the enforcement of arbitration agreements according to their terms;<sup>68</sup> and, a few sentences later, the "principal purpose" of the Act is to "ensur[e] that private arbitration agreements are

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64. FED. R. CIV. P. 23.

65. See 29 U.S.C. § 216(b) (2012).

66. 131 S. Ct. 1740 (2011).

67. *Id.* at 1748.

68. *Id.*

enforced according to their terms.”<sup>69</sup> Consequently, California could not apply its general law of contract to deny effect to a waiver of collective action.<sup>70</sup> Nevertheless, the Court catalogued the extensive benefits in the particular arbitration provision the Concepcions received,<sup>71</sup> despite their desire to forego them.

Any ambiguity in the policy the Court announced—whether to enforce preclusion of group participation as written per se or to enforce only such a preclusion where it was accompanied by other provisions that allowed streamlined access to justice—was reached shortly thereafter in *American Express Co. v. Italian Colors Restaurant*.<sup>72</sup> Here, the plaintiff restaurant attempted to bring a class antitrust claim against American Express for its fee policy. Again, a lower court refused to give effect to the class action waiver. In a previous decision the Supreme Court had said that were the cost of arbitration to “preclude a litigant . . . from effectively vindicating her federal statutory rights” the arbitration agreement might be unenforceable; but, it placed the burden on the plaintiff to prove that that was so.<sup>73</sup> In *Italian Colors*, the plaintiff merchant had shown that the expert testimony needed to prove the antitrust violation would cost in the hundreds of thousands of dollars, but the maximum amount of individual damages the restaurant could receive would be less than forty thousand dollars. Wherefore the class action.

The lower court held, in view of the economics of the situation, that the class action waiver denied the plaintiff the ability to vindicate the statutory claim. The Supreme Court was unpersuaded: “[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>74</sup> The Court reiterated that the statutory purpose of the Arbitration Act was to enforce arbitration contracts “as written,” echoing at the close its opinion in *AT&T Mobility*: “[T]he switch from bilateral to class arbitration,’ we said, ‘sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass

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69. *Id.* (internal quotation marks omitted).

70. *Id.* at 1748 (citing *inter alia* *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (holding that arbitrators lack power to allow class arbitration when the contract is silent on the issue)).

71. *Id.* at 1744 (reciting that AT&T must pay all costs for nonfrivolous claims; that the arbitration could proceed in person or by telephone or on written submission; that the arbitrator had broad remedial power; and, notably, that either party could proceed to small claims court in lieu of arbitration).

72. 133 S. Ct. 2304 (2013).

73. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

74. *Italian Colors*, 133 S. Ct. at 2311.

than final judgment.”<sup>75</sup> This, even though the advantage to the restaurant was to render its statutory claim a *fata morgana*.

#### IV. THE NORRIS-LAGUARDIA ACT CONFRONTS A RECONSTRUCTED ARBITRATION ACT

A prefatory word. Section 7 of the National Labor Relations Act converted section 2 of the Norris-LaGuardia Act, which limits the courts, into restraints on employers. The United States Supreme Court held the right to engage in “concerted activities . . . for mutual aid or protection” under the Labor Act applies to collective efforts by employees to improve their lot as employees by resort to any forum—administrative, legislative, or judicial—as well as to engage in lawful self-help.<sup>76</sup> Consequently, the National Labor Relations Board (which administers the Labor Act) applied section 7 to an employment agreement that mandated arbitration, but precluded collective resort in the arbitral forum. The Board held the provision to be violative of the Labor Act;<sup>77</sup> but, the Board’s decision was denied enforcement by a divided Court of Appeals<sup>78</sup> and has been given no collateral effect by the courts in direct challenges to the waiver of group or class arbitrations.<sup>79</sup>

In denying enforcement the Fifth Circuit echoed an approach taken by other courts to the relationship of the Norris-LaGuardia Act to the Arbitration Act: it opined that the text or legislative history of the succeeding Act, in this case, the Labor Act, had strongly to evidence an intent to override the reach of the earlier, Arbitration Act. Not surprisingly, it found none. More on that below. But, by footnote, it dismissed the Board’s reliance on Norris-LaGuardia as a law that lay “outside the Board’s interpretive ambit.”<sup>80</sup>

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75. *Id.* at 2312 (quoting *AT&T Mobility*, 131 S. Ct. at 1751).

76. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–67 (1978).

77. *D.R. Horton*, 357 N.L.R.B. No. 184 (2012). See generally Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013) (discussing the soundness of the NLRB’s decision in *D.R. Horton*).

78. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356–64 (5th Cir. 2013).

79. See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013). But see *Walthour v. Chipio Winshield Repair, LLC*, 944 F. Supp. 2d 1267, 1278–79 (N.D. Ga. 2013) (concurring because of the law of the Circuit but opining in dictum to the contrary).

80. *D.R. Horton*, 737 F.3d at 362, n.10. The majority opinion is most curious. It notes that, “Board precedent and some circuit courts have held that [section 7’s protection of concerted activity] protects collective-suit filings.” *Id.* at 356 (emphasis added). The opinion fails to mention the Supreme Court’s affirmances to that effect in *Eastex*, 437 U.S. 556. The court stresses that there were no class actions when the Labor Act was passed; but it neglects the disclaimer’s reach to

Be that as it may, as the Norris-LaGuardia Act does speak directly to the courts, one would think that it must be heard when these waivers are directly attacked under it. Thus far, however, the courts have found nothing in the Norris-LaGuardia Act to constrain their ability to enforce these waivers. They have reached that result by one of three routes. The first is a model of concision: “An agreement to arbitrate is not one of those contracts to which the Norris-LaGuardia Act applies.”<sup>81</sup> Nothing more, not one further word of explanation is uttered. This was the tack taken by the court in *Ms. Ryan’s case*.<sup>82</sup>

The second does say something more. Inasmuch as other forms of collective protest are not precluded, inasmuch as collective resort to administrative agencies that might provide relief—for example, to the Department of Labor for claims of wage cheating—may be had, collective resort to the forum the contract allows can be precluded.<sup>83</sup> But no more than this is said.

The third does see that Norris-LaGuardia speaks to the contract and so sees a need to engage with it; but, because the Supreme Court’s reading of the Arbitration Act requires a “contrary congressional command”<sup>84</sup> to override that law’s mandate, and because the Norris-LaGuardia Act “did not expressly provide that it was overriding any provision of” the Arbitration Act, the contractual preclusion of group action is controlled by that Act, not by Norris-LaGuardia.<sup>85</sup> This was the tack taken analogously by the Fifth Circuit to the Labor Act’s relationship to the Arbitration Act.<sup>86</sup>

None of these provide a satisfactory response. The first ignores the Act altogether. It rests on nothing more than a bald assertion that Norris-LaGuardia does not apply.

The second engages with the Act, but plays fast with the text. Section 3 denies legal effect to “any undertaking or promise” that denies the employee the capacity to engage in lawful concerted activity.<sup>87</sup> As the painstaking care in drafting evidences, “any” undertaking or

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*all* group actions, not only those of a representative nature. *D.R. Horton*, 737 F.3d at 361.

81. *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012).

82. *Ryan v. JPMorgan Chase & Co.*, 924 F. Supp. 2d 559, 565–66 (S.D.N.Y. 2013).

83. *Owen*, 702 F.3d at 1053–54 (8th Cir. 2013). *See also* *Torres v. United Healthcare Servs., Inc.*, 920 F. Supp. 2d 368, 378–79 (E.D.N.Y. 2013) (following the analysis in *Owen*).

84. *Jasso v. Money Mark Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012) (quoting *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)) (internal quotation marks omitted).

85. *Id.*

86. *See supra* text accompanying note 80. This reasoning has been applied as well to the Fair Labor Standards Act’s express provision for opt-in group action. *Dixon v. NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 404 (S.D.N.Y. 2013).

87. 29 U.S.C. § 103 (2012).

promise was meant to say just that: not “some” undertakings or promises; nor only those promises or undertakings where other means of collective protest or relief are not available. Some yellow dog contracts prohibited membership or support of only a specific union, or only of those unions active in the area, or allowed support of unions elsewhere.<sup>88</sup> United States Gypsum Plaster Company’s contract “bound its employees not to join ‘the I.W.W. or any other communistic or like organization,’ apparently placing no obstacle in the way of a union of the American Federation of Labor type.”<sup>89</sup> Yet, there should be little doubt that Norris-LaGuardia would deny enforcement to any of these. The contractual allowance of concerted resort via non-proscribed sodalities or in non-prohibited venues has no bearing on the unenforceability of what is contractually proscribed.

The third reasons anachronistically; indeed, it runs counter to the maxim of construction that, in the event of a conflict between two laws, the more recent—in this case, the Norris-LaGuardia Act—controls.<sup>90</sup> It is true that nowhere in the extensive exchanges within the drafting committee, by the draftsmen with the members of the Senate subcommittee, or in the congressional debate is any mention made, is any notice even taken of the Arbitration Act. Should it have been? This line of reasoning faults Frankfurter, Witte, Richberg, Oliphant, and Sayre; it faults Senators Norris, Blaine, and Walsh; it faults the Congress for failing to have anticipated, in 1932, that a commercial arbitration law enacted seven years before, from which employment contracts had been exempted, would be given the meaning the Supreme Court was to accord it three quarters of a century later, reversing its own precedent to do so. Norris, Frankfurter, and the lot were a perspicacious bunch, but this reasoning asks rather much of legislative foresight. Something more serious must be at work to explain these decisions.

## V. THE POLICY CHOICE

Felix Frankfurter and Nathan Greene observed that “[s]tatutory construction in doubtful cases, in the last analysis, is a choice among competing policies as starting points for reasoning.”<sup>91</sup> On the assumption that the case might be doubtful, the policy choice presented will be discussed below. Before reaching it, however, guidance may be

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88. SEIDMAN, *supra* note 18, at 63–64.

89. SEIDMAN, *supra* note 18, at 63–64 (footnote omitted).

90. *See generally* Sullivan & Glynn, *supra* note 77, at 1046–55 (discussing in detail the maxim and its application to the relevant legislation). It applies to the Labor Act’s protection of concerted activity for mutual aid or protection as well, which the Fifth Circuit addressed in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013).

91. FRANKFURTER & GREENE, *supra* note 26, at 169.

given by the Court's disposition on two prior occasions when other statutory policies were argued to as cabining the mandate of Norris-LaGuardia.

### A. The Court's Further Explication of Norris-LaGuardia

In two cases about to be discussed the Court confronted arguments that later law and the policies they effected should color the reach or meaning of Norris-LaGuardia. In the second case, earlier law was also pointed to as playing that role, rather echoing the third of the three approaches just canvassed. If the courts are faithful to precedent, these cases provide a guide for reasoning.

The first proved deeply troublesome—so troublesome that in the space of a few years the Court reversed itself. The issue was this: collective bargaining conducted under the Labor Act customarily results in a pledge by the union to forebear any strike and a corresponding agreement by the employer to arbitrate grievances. If the union strikes nevertheless, in breach of its “no strike” promise, may a court enjoin it?

The answer the Court first gave was “no.”<sup>92</sup> Norris-LaGuardia's denial of power to enjoin strikes made no exception for this situation; and Congress, in fashioning section 301 of the 1947 Taft-Hartley Act authorizing the federal courts to enforce collective agreements, did not add one.<sup>93</sup> The Court invited Congress to amend the law.<sup>94</sup> Congress did not. Eight years later, in *Boys Markets Inc., v. Retail Clerk's Union Local 770*, the Court reversed itself.<sup>95</sup>

The Court sought to accommodate the otherwise clear prohibition of section 4 with the law the Court had developed under section 301, which took arbitration as the quid pro quo for the no strike promise<sup>96</sup> and took arbitration to be part and parcel of a system of industrial self-government.<sup>97</sup> The Court held that the union's agreement to arbitrate a dispute, coupled with its agreement not to strike, could only be made meaningful if the employer could enjoin a strike over an arbitrable grievance.<sup>98</sup> But, critically, only when the subject of the strike

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92. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 203 (1962).

93. *Id.* at 201–04. *But see id.* at 201–02 n.12 (discussing one of the arguments supporting the power to enjoin).

94. *Id.* at 214.

95. 398 U.S. 235, 238 (1970).

96. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957).

97. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The case is one of the famous trilogy of *Steelworkers* cases decided that day and which has set national labor policy ever since. The other two cases are *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960) and *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

98. *Boys Markets*, 398 U.S. at 252–53.

could be taken to arbitration.<sup>99</sup> In this, the Court gave effect to the collective representative's choice to substitute its resort to its collective system of industrial justice<sup>100</sup> for the collective process of the strike.

In sum, the policy in support of collective bargaining was critical to the decision. It gave the Court space to reconcile the Labor Act with Norris-LaGuardia, for both protected concert of action. As a result, although *Boys Markets* struggled with a conflict between Norris-LaGuardia's denial of judicial power and the texture of law developed under later labor law, the decision lends no support to the notion that section 2's protection of concert of action can be truncated by employer-generated contracts of adhesion that allow only for individual arbitration, that preclude any form of collective resort in that forum.

The second case proved less vexing, but the policy arguments were no less clear. The Railway Labor Act of 1926 is silent with respect to secondary boycotts, i.e., efforts to strike at strangers to a labor dispute in order to pressure them to bring pressure on the union's real target. The Norris-LaGuardia Act's denial of injunctive power is also silent on that issue. But, the Taft-Hartley Act of 1947 did impose a finely tuned scheme of secondary boycott prohibitions in employments covered by that law; these, however, did not apply to employees covered by the Railway Labor Act. Because a secondary strike in the railway industry had been enjoined, the Court had to decide whether the strong federal policy disfavoring that weapon spoke to the reach of Norris-LaGuardia, and also whether the Railway Labor Act's treatment of secondary boycotts—by its silence taken in the context of time—constrained the Norris-LaGuardia Act.<sup>101</sup> That is, whether the later statutory policy or the earlier statutory silence colors the law's reach.

On the former, the Court held that nothing in Taft-Hartley's treatment of secondary boycotts spoke to Norris-LaGuardia; Taft-Hartley's provisions were self-defining and self-limiting. On the latter, although specific provisions of the Railway Labor Act could be effected by injunction, such being the clear reach of that law, the fact that secondary boycotts might have been unlawful in 1926, coupled with the Railway Labor Act's silence on that issue at that time, did not mean that Norris-LaGuardia should be read to allow injunctions directed to secondary activity in railroading, *i.e.* to add a limiting condition not expressed in the text.

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99. *See* *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 405 (1976) (finding the issue of a sympathy strike subject to arbitration).

100. *See* *Vaca v. Sipes*, 386 U.S. 171, 191–92 (1967) (finding that the authority to pursue a grievance to arbitration is the union's, not the individual's; it is a collective resort).

101. *Burlington N.R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 436 (1987).

Significant for present purposes, the Court closed with a separate rumination on Norris-LaGuardia, choosing to reiterate what it had said about it previously: The law was a reaction to the “judge-made law of the late 19th and early 20th centuries [that] was based on self-mesmerized views of economic and social theory.”<sup>102</sup> The law’s concern was about power: in that case, a power Congress did not confer, to enjoin secondary boycotts, and which the Court would not bestow.

That passage has purchase here. Norris-LaGuardia’s denial of power transcended injunctive relief. It denied the power to enforce promises or undertakings in violation of section 2. That restriction was also imposed in reaction to the judiciary’s self-mesmerized view of social and economic policy; that is, the by-then shopworn catchphrase of “freedom of contract” and the moral value of individual self-representation that modern industrial conditions belied.<sup>103</sup>

To sum up: the Court has engaged with the claim that the categorical nature of Norris-LaGuardia should be abandoned or softened in light of subsequent law and policy. It accepted the claim, albeit with great difficulty, when the result was consonant with Norris-LaGuardia’s support for collective activity as expressed in the terms of collective bargaining agreements. It rejected the claim when what was sought was a constraint on collective action. More than that, in the latter, the Court reiterated its understanding that Norris-LaGuardia rejected unequivocally the prevailing pieties that the *Hitchman* Court embraced.

## B. The Policy Choice

Section 3 of Norris-LaGuardia Act denies enforcement to any promise or undertaking by which the employee forswears the taking of a course of protective action in common. Consequently, a federal court may not enforce section 4 of Ms. Ryan’s contract. This should be the end of the matter; but assuming more is needed, that more would be an engagement with the competing policies the two statutes embody.

On the one hand, the Arbitration Act tells us that contracts to arbitrate future disputes are to be put on the same plane as all other contracts. From the text no conflict in policy emerges as the Norris-LaGuardia Act applies to all contracts. But the United States Su-

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102. *Id.* at 453 (quoting *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969) (citing, *inter alia*, FRANKFURTER & GREENE, *supra* note 26, at 1–46, 199–205 (1930))).

103. FRANKFURTER & GREENE, *supra* note 26, at 1–46, 199–205; Ernst, *supra* note 46, at 266 (citing FRANKFURTER & GREENE, *supra* note 26, at 214). Ernst quotes Donald Richberg: “It is a waste of time to criticize judges who chatter about equality of right and liberty of contract between a billion dollar corporation and a man looking for a job.” *Id.* (internal quotation marks omitted).

preme Court has sublimated this provision.<sup>104</sup> Agreements to arbitrate are not to be treated as akin to all other contracts; instead they must be enforced “as written.” The Court has explained its preference for bilateral, that is, individual, arbitration as arising out of its informality and speed; but, even where the consequence of judicial enforcement of a disclaimer of collective resort in the commercial setting is to create an obstacle to the vindication of the underlying legal claim, the contract must be enforced as written nevertheless, because, the Court has said, it just must. If so in the commercial setting, so, too, in employment.

On the other hand, we have a statute that tells us that any undertaking or promise by which an employee agrees to eschew any concerted activity with her fellow workers for their mutual aid or protection cannot be enforced. It is against public policy. Thus far, the courts confronting the text have not examined the policy behind the prohibition; in fact, they seem not to have consulted the text. After all, it is an old law, little called upon today and little understood—an anachronism, perhaps. Lost to judicial memory is the yellow dog contract in all its many variants that so inflamed the passions generations ago and which gave rise to Norris-LaGuardia. Nevertheless, unless we are prepared to hold, as apparently some lower courts have, that the Supreme Court’s policy sublimation sweeps away any inconvenient barrier, no matter what, engagement with the public policy announced in section 2 of Norris-LaGuardia cannot be avoided.

That policy lies in plain view, just as the bill’s supporters intended, on the pages of the *Congressional Record*.<sup>105</sup> Senator Norris put the situation of the “laboring man” presented with contracts of the sort that Norris-LaGuardia would reach, thusly:

His family can not have food to eat or clothes to wear unless he gets a job. If he gets a job, he must surrender his liberty. . . . He can not associate with his fellows. In connection with his fellows, he can not present a grievance to the employer. He has agreed to make no such demand. . . . *He must singly present any grievance he has.* He must abide by the decision which is thus given him. He has no appeal. *He has no opportunity to join with his fellows and make his demands effective.* In effect, if he must live and support his family and clothe his children, he must surrender his liberty.<sup>106</sup>

His fellow member of the subcommittee that invited the five to draft the Act, Senator Blaine, observed that, “If employers can, through such methods [as the yellow-dog contract] prevent their em-

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104. See Sullivan & Glynn, *supra* note 77, at 1043, 1043 n.172 (discussing literature and noting that, despite the lack of doctrinal support, some argue the Court has made the Arbitration Act into a “super statute”). Despite the lack of doctrinal support, the authors agree that the view has “descriptive reality.” Sullivan & Glynn, *supra* note 77, at 1043 n.172.

105. See Lovell, *supra* note 55.

106. 75 CONG. REC. 4504 (1932) (remarks of Sen. Norris) (emphasis added).

ployees from belonging to labor unions, they can also prevent them from belonging to any church or lodge, or, in fact, doing anything either in or out of working hours that they do not like.”<sup>107</sup> Norris immediately pointed out that Blaine was not being hypothetical: in the wake of the *Hitchman* decision “employers then continued to put into their contracts other provisions and stipulations, which were much worse than those the Senator has read.”<sup>108</sup> These many variants were well known. Witte had written to William Green, President of the AFL, that the “social aspects” and “effects” of yellow dog contracts “have now become much more apparent than they were ten years ago”<sup>109</sup> among which were promises requiring the individual presentation of grievances.<sup>110</sup>

The policy against these restraints lies in the recognition of the employee’s “moral dignity,”<sup>111</sup> independence,<sup>112</sup> “human liberty.”<sup>113</sup> The Act disallowed American workers becoming atomized by employer policies that required them to deal exclusively on an individual basis

107. 75 CONG. REC. 4628 (1932) (remarks of Sen. Blaine).

108. *Id.* (remarks of Sen. Norris).

109. Letter from Witte to William Greene, *supra* note 30.

110. *See supra* text accompanying note 42.

111. 75 CONG. REC. 4692 (remarks of Sen. Walsh quoting a pastoral letter of Roman Catholic bishops). As noted earlier, the demand for individual dealing was made mostly by smaller or medium-sized employers. Larger employers sought employee representation, but by representation plans of their devising. Even then, employers encountered the human desire for liberty and dignity. The most prominent promoter of employee representation at the time was John D. Rockefeller, Jr., who instituted a representation plan in the Colorado Fuel & Iron Company in the wake of the Ludlow Massacre of 1914. *See generally* JONATHAN REES, REPRESENTATION AND REBELLION: THE ROCKEFELLER PLAN AT THE COLORADO FUEL AND IRON COMPANY, 1914–1942 (2010). In 1921, Rockefeller dispatched his aide, Raymond B. Fosdick, to survey the labor relations situation in his Colorado properties. On November 1, 1921, Fosdick wrote to Rockefeller:

There is a psychological appeal in labor unionism which has not yet been analyzed. It seems to give the men a sense not only of power but of dignity and self-respect. They feel that only through labor unions can they deal with employers on an equal plane. They seem to regard the representation plan as a sort of counterfeit, largely perhaps, because the machinery of such plans is too often managed by the employers. They want something which they themselves have created and not something which is handed down to them by those who pay their wages. On no other basis can I account for the passionate desire for unionization which has seized upon so large a proportion of the miners, not only in the Kentucky district but in Maryland and Pennsylvania as well.

RAYMOND FOSDICK, JOHN D. ROCKEFELLER, JR.: A PORTRAIT 177–78 (1956) (quoting communication between Fosdick and Rockefeller). Company dominated labor organizations were proscribed in the Labor Act. 29 U.S.C. § 158(a)(2) (2012).

112. 75 CONG. REC. 4918 (1932) (remarks of Sen. Wagner) (“If into this condition of affairs [the accumulation of great capital] we should inject the archaic notions of master and servant, what kind of citizenship will inhabit the continent in the next generation?”).

113. 75 CONG. REC. 4502 (1932) (remarks of Sen. Norris).

over their rights and grievances; and it did so by denying enforcement to any contract, to any promise or undertaking having that effect.

## VI. THE MORAL DIMENSION

It has become a commonplace that as unions have declined in the private sector positive law has come increasingly to fill the vacuum.<sup>114</sup> Consequently, contestation in employment has turned more on public law than private contract; it has moved from the workplace to the courthouse and, by employer resort to the Arbitration Act, from there into the private forum. Norris-LaGuardia teaches that workers may not be denied, by any undertaking or promise, the liberty collectively to seek redress for workplace rights. May they be denied by such a device the liberty collectively to vindicate their workplace legal rights?<sup>115</sup>

The Court's emphasis on the value of "bilateral" arbitration in *AT&T Mobility* was couched in instrumental terms, i.e., the benefit to the individual of a swift and informal procedure.<sup>116</sup> But when that instrumental benefit is absent, in fact negated in *Italian Colors*, the Court persisted in its commitment to individualization. In this we cannot help but hear a reiteration of the self-mesmerized moral vision of the judiciary of the last quarter of the nineteenth century, its embrace of the inviolability of individuality and contract that Norris-LaGuardia repudiated. For "freedom of contract" then, substitute "contracts must be enforced as written" now. Nothing has changed.

The response in section 2 of Norris-LaGuardia was equally instrumental: concert of action had to be protected as a counterweight to the power of capital; the individual was helpless. But, the Congressional debate points to a competing moral vision as well: that the dignity of the individual requires that she be free of employer constraint by any promise or undertaking that limits her capacity to make common cause for mutual protection. This, too, is a moral vision, one with deep roots.

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114. PAUL WEILER, *GOVERNING THE WORKPLACE* 22–29 (1990) (discussing the law's increasing regulation of the employment relationship); CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 52–74 (2010) (discussing the rise of employment law with respect to labor standards and employee rights).

115. Is there any meaningful difference between a contract that says, "I agree that I will present any grievance I might have arising out of my employment only as a single individual; I will not join with nor be joined by any others in seeking to present a common grievance," and one that says, "I agree that any grievance I might have grounded in an alleged violation of any statutory right arising out of my employment will be heard exclusively in my employer's arbitration system and I will not join with nor be joined by any others in the presentation of a common claim"?

116. *But see* Ruan, *supra* note 3 (arguing that these benefits have not materialized in the context of wage theft).

In the third century B.C.E., Koheleth, known to us as Ecclesiastes, wrote what he acknowledged as conventional wisdom. "Men say," he wrote, that, "Two are better than one, because they have a reward in their labour."<sup>117</sup> But he added an exegesis, "[I]f either falls, the other can lift his comrade, but woe to him who is alone when he falls, with no one else to lift him."<sup>118</sup>

The passage, written by a teacher who had no illusions about the exercise of power,<sup>119</sup> has practical purchase; but it also contains a moral truth<sup>120</sup>: that as the individual draws strength from and is sustained in life by others<sup>121</sup> it is morally right to aid another, to make common cause, and morally wrong to be prevented from so doing. The contest between JPMorgan Chase and Tiffany Ryan poses a conflict not only of practical outcome, but of moral dimension. It puts this question to us afresh: are two still better than one?

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117. *Ecclesiastes* 4:9 (internal quotation marks omitted) (as translated in ROBERT GORDIS, *KOHELETH: THE MAN AND HIS WORLD* 150 (1955)).

118. *Id.* 4:10 (as translated in GORDIS, *supra* note 117). In addition to the translation, Gordis provides commentary on the provenance and worldview of the book. See also JAMES CRENSHAW, *ECCLESIASTES: A COMMENTARY* 110 (1987) (providing further commentary).

119. *Ecclesiastes* 4:1 ("Again I saw all the acts of oppression that were done under the sun. Here are the tears of the oppressed, with none to comfort them; and power in the hands of their oppressors, with none to comfort them.") (as translated in GORDIS, *supra* note 117, at 148). The three-fold repetition of oppression in the nuanced Hebrew of the time is significant for its rhetorical power. CRENSHAW, *supra* note 118, at 105.

120. In Hebrew, as in English, "better" is the absolute comparative of "good"—*toḅ* in Hebrew. Something can be good—or better—because it pleases, is effective, or is morally right.

121. Note Representative Schneider's attack on the labor injunctions that Norris-La-Guardia would prohibit:

There have been injunctions denying striking workmen the right to meet in their churches and sing hymns and join together in worship, because these places were in close proximity to the property where a strike was in progress. One Federal judge enjoined the singing by strikers of the hymn "Onward Christian Soldiers," because the feeling engendered by the singing of that hymn *created a sense of solidarity and devotion to a common cause which would strengthen the determination of the strikers to continue the struggle.*

75 CONG. REC. 5515 (1932) (remarks of Rep. Schneider) (emphasis added). To the same effect, 75 CONG. REC. 5467 (1932) (remarks of Rep. Greenwood); 75 CONG. REC. 5481 (1932) (remarks of Rep. Oliver). Rep. Beck argued *per contra* that "some of the proponents of this law, having visited Moscow and become somewhat enamored with its political philosophy, have endeavored to write a rule of public policy into this law which I could understand if Moscow had provided it . . ." 75 CONG. REC. 5474 (1932) (remarks of Rep. Beck).